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THE

British Ruling Cases



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TABLE OF ABBREVIATIONS.

[1891] A. C.	Law Reports, Appeal Cases (1891 onwards.)
Ad. & El.	Adolphus and Ellis. Q. B.
Addams Eccl. Rep.	Addams, Ecclesiastical.
Al. & Nap.	Alcock & Napier (Ireland).
Aleyn	Aleyn. K. B.
Alta. R.	Alberta Law Reports.
Amb.	Ambler. Ch.
Ander.	Anderson. C. P.
Andrews.	Andrews. K. B.
Anster.	Anstruther. Ex.
App. Cas.	Law Reports, Appeal Cases (1876-1890).
Arn. & H.	Arnold and Hodges. Q. B.
Arnold	Arnold. C. P.
Asp. Mar. L. Cas.	Aspinall. Maritime Cases.
Atk.	Atkyns. Ch.

Ball & B.	Ball and Beatty. Ch. (Ireland).
Bar. & Arn.	Barron and Arnold. Election.
Bar. & Au.	Barron and Austin. Election.
Barn. & Ad.	Barnewall and Adolphus. K. B.
Barn. & Ald.	Barnewall and Alderson. K. B.
Barn. & C.	Barnewall and Cresswell. K. B.
Barnard, Ch.	Barnardiston. Ch.
Barnard, K. B.	Barnardiston. K. B.
Batty	Batty. K. B. (Ireland).
B. C.	British Columbia Reports.
B. C. C.	Lowndes and Maxwell. Bail Court.
B. C. Rep.	Saunders and Cole. Bail Court.
Beat.	Beatty. Ch. (Ireland).
Beav.	Beavan. Rolls Court.
Bell	H. L. (Scotland).
Bell, C. C.	Bell. Crown Cases.
Best & S.	Best and Smith. Q. B.
Bing.	Bingham. C. P.
Bing. N. C.	Bingham. New Cases. C. P.
Bligh	Bligh. H. L.
Bligh, N. R.	Bligh. New Reports. H. L.
Bos. & P.	Bosanquet and Puller. C. P.
Bos. & P. N. R.	Bosanquet and Puller. New Reports. C. P.
Bott Poor Law Cas.	Bott's Poor Laws.
Br. & Col. Prize Cas.	British and Colonial Prize Cases.
B. R. C.	British Ruling Cases.
Bro. Ch.	Brown. Ch.
Brod. & B.	Broderip and Bingham. C. P.
10 B. R. C.	iii

Bro. P. C.	Brown. Cases in Parliament.
Brown & L.	Browning and Lushington. Adm.
Buck	Buck. Bky.
Bull. N. P.	Buller's Law of Nisi Prius.
Bulstr.	Bulstrode. K. B.
Bunbury	Bunbury. Ex.
Burr.	Burrows. K. B.
Burr. Sett. Cas.	Burrows. Settlement Cases.
Cab. & El.	Cababé and Ellis. Nisi Prius.
Cald.	Caldecott. Settlement Cases.
Cameron (Can.)	Cameron. Upper Canada, Q. B.
Campb.	Campbell. Nisi Prius.
Canadian Rep. A. C.	Canadian Reports Appeal Cases.
Can. Crim. Cas.	Canadian Criminal Cases.
Can. Exch.	Exchequer Court of Canada Reports.
Can. Law Times	Canadian Law Times (Ontario), Canadian Law Times Occasional Notes (Ontario).
Can. L. J.	Upper Canada Law Journal, N. S. and Can- ada Law Journal.
Can. S. C.	Supreme Court of Canada Reports.
Car. & K.	Carrington and Kirwan. Nisi Prius.
Car. & M.	Carrington and Marshman. Nisi Prius.
Car. & P.	Carrington and Payne. Nisi Prius.
Carter	Carter. C. P.
Carth.	Carthew. K. B.
Cary	Cary. Ch.
Cas. t. Hardw.	Cases temp. Hardwicke. K. B.
Cas. t. Talb.	Cases temp. Talbot. Ch.
C. B.	Common Bench Reports.
C. B. N. S.	Common Bench. New Series.
[1891] Ch.	Law Reports, Chancery (1891 onwards).
Ch. Cas.	Cases in Chancery.
Ch. Cas. Ch.	Choice Cases in Chancery.
Ch. Chamb. Rep. (Can.)	Chancery Chamber Reports (Ontario).
Ch. D.	Law Reports, Chancery (1876-1890).
Chitty	Chitty. Bail Court.
Clark & F.	Clark and Finnelly. H. L.
C. L. Ch.	Common Law Chamber Reports (Ontario).
C. L. R. (Can.)	Common Law Reports (1853-1855).
Coke	Coke. K. B.
Colles	Colles' Cases in Parliament.
Colly. Ch. Cas.	Collyer. Ch.
Colt.	Coltman. Registration.
Comb.	Comberbach. K. B.
Com. Cas.	Commercial Cases (1895 onwards).
C. L. R. (Austr.)	Commonwealth Law Reports (Australia).
Comyns Rep.	Comyns. K. B.
Con. & L.	Connor and Lawson. Ch. (Ireland).
Cooke & Al.	Cooke & Alcock (Ireland).
Cooper	Cooper. Ch.
10 B. R. C.	

ABBREVIATIONS.

Coop. t. Brougham	Cooper. Cases temp. Brougham.
Coop. t. Cott.	Cooper. Cases in Chancery temp. Cottenham
Cowp.	Cowper. K. B.
Cox, C. C.	Cox. Crown Cases.
Cox Ch. Cas.	Cox. Ch.
C. P. Cooper	C. P. Cooper. Ch.
C. P. D.	Law Reports, Common Pleas Division (1875-1880).
C. R. [1908] A. C.	Canadian Rep. Appeal Cases.
Craig & Ph.	Craig and Phillips. Ch.
Craw. & D. (Ir.)	Crawford and Dix (Ireland).
C. Rob.	Sir C. Robinson Adm. (1798-1808).
Cr. App. Rep.	Criminal Appeals Reports.
Cro. Car.	Croke's Rep. temp. Charles I.
Cro. Eliz.	Croke's Rep. temp. Elizabeth.
Cro. Jac.	Croke's Rep. temp. James I.
Crompt. & J.	Crompton and Jarvis. Ex.
Crompt. & M.	Crompton and Meeson. Ex.
Crompt. M. & R.	Crompton, Meeson and Roscoe. Ex.
Ct. App. Rep. N. Z.	Court of Appeals Reports (New Zealand).
Ct. of Sess. Cas.	Court of Session Cases (Scotland).
Curt. Eccl. Rep.	Curteis. Eccl.
Daniell	Daniell. Ex. Eq.
Dans. & Ll.	Danson and Lloyd. Mercantile.
Dav. & M.	Davison and Merivale. Q. B.
Deacon & C.	Deacon and Chitty. Bky.
Deacon Bankr	Deacon. Bky.
Dears. & B. C. C.	Dearsley and Bell. Crown Cases.
Dears. C. C.	Dearsley. Crown Cases.
De G.	De Gex. Bky.
De G. & J.	De Gex and Jones. Ch. App.
De G. & Sm.	De Gex and Smale. Ch.
De G. F. & J.	De Gex, Fisher and Jones. Ch. App.
De G. J. & S.	De Gex, Jones and Smith. Ch. App.
De G. M. & G.	De Gex, Macnaghten and Gordon. Ch. App.
Den. C. C.	Denison. Crown Cases.
Dick.	Dickens. Ch.
Dodson, Adm.	Dodson. Adm.
Dougl. K. B.	Douglas. K. B.
Dow	Dow. H. L.
Dow & C.	Dow and Clark. H. L.
Dowl. & L.	Dowling and Lowndes. Practice Cases.
Dowl. & R.	Dowling and Ryland. K. B.
Dowl. P. C.	Dowling. Practice Cases.
Dowl. P. C. N. S.	Dowling. Practice Cases. New Series.
Drew.	Drewry. Ch.
Drew. & S.	Drewry and Smale. Ch.
Drink.	Drinkwater. C. P.
Dru.	Drury. Ch. (Ireland).
Drury & Wal.	Drury and Walsh. Ch. (Ireland).
Drury & War.	Drury and Warren. Ch. (Ireland).
10 B. R. C.	

- Hagg. Eccl. Rep. Haggard. Eccl.
Hall & Tw. Hall and Twells. Ch.
Hardr. Hardres. Ex.
Hare Hare. Ch.
Harr. & R. Harrison and Rutherford. C. P.
Harr. & W. Harrison and Wollaston. Bail Court.
Hawk. P. C. Hawkins's Pleas of the Crown.
Hayes & J. Hayes and Jones. Ex. (Ireland).
Hayes Exch. Hayes. Ex. (Ireland).
H. Bl. H. Blackstone. C. P.
Hem. & M. Hemming and Miller. Ch.
H. L. Cas. House of Lords Cases.
Hobart Hobart. K. B.
Hodges. Hodges. C. P.
Hog. Hogan. Rolls (Ireland).
Holt Holt. K. B.
Holt, Eq. Holt. Eq.
Holt, N. P. Holt. Nisi Prius.
Hopw. & C. Hopwood and Coltman. Registration.
Hopw. & P. Hopwood and Philbrick. Registration.
Horn & H. Horn and Hurlstone. Ex.
Hurlst. & C. Hurlstone and Coltman. Ex.
Hurlst. & N. Hurlstone and Norman. Ex.
Hurlst. & W. Hurlstone and Wamsley. Ex.

[1894] I. R. Irish Law Reports (1894 onwards).
Ir. Ch. Rep. Irish Chancery (1850-1866).
Ir. C. L. Rep. Irish Com. Law (1850-1866).
Ir. Eq. Rep. Irish Equity Reports.
Ir. Rep. C. L. Irish Com. Law (1866-1878).
Ir. Rep. Eq. Irish Equity (1866-1878).

Jac. & W. Jacob and Walker. Ch.
Jacob Jacob. Ch.
Jebb & B. Jebb & Bourke (Ireland).
Jebb & S. Jebb & Symes (Ireland).
Jenkins Jenkins. Ex.
J. Kelyng Sir J. Kelyng. Crown Cases.
Johns. & H. Johnson and Hemming. Ch.
Johns. Ch. Johnson. Ch.
Jones Jones. Ex. (Ireland).
Jones & C. Jones and Carey. Ex. (Ireland).
Jones & L. Jones and Latouche. Ch. (Ireland).
J. P. The Justice of the Peace.
Jur. The Jurist.

K. & F. N. S. W. Knox & Fitzhardinge (New South Wales).
K. & G. Keane and Grant. Registration.
Kay Kay. Ch.
Kay & J. Kay and Johnson. Ch.
[1901] K. B. Law Reports Kings Bench (1901 onwards).
10 B. R. C.

Keble	Keble. K. B.	
Keen	Keen. Rolls Court.	
Keilw.	Keilway. K. B.	
Kenyon	Kenyon. K. B.	
Knapp & O.	Knapp and Ombler. Election.	
Knapp P. C. C.	Knapp. P. C.	
Knox, N. S. W.	Knox (New South Wales).	
Latch	Latch. K. B.	
Ld. Raym.	Lord Raymond. K. B.	
Leach, C. L.	Leach. Crown Cases.	
Leigh & C. C. C.	Leigh and Cave. Crown Cases.	
Lev.	Levinz. K. B.	
Lewin, C. C.	Lewin. Crown Cases.	
L. G. R.	Local Government Reports.	
Lit. Rep.	Littleton. C. P.	
L. J. Ch. K. B. etc.	Law Journal Reports, 1822 to 1831.	
L. J. Bkr. N. S.	Bankruptcy.	
" Ch. N. S.	Chancery.	} From 1831 onwards.
" C. P. N. S.	Common Pleas.	
" Eccl. N. S.	Ecclesiastical.	
" Exch. N. S.	Exchequer.	
" Mag. Cas. N. S.	Magistrates' Cases.	
" P. C. N. S.	Privy Council.	
" Prob. N. S.	Probate and Matrimonial.	
" Prob. N. S.	Probate, Divorce, and Admiralty.	
" Prob. N. S.	Admiralty.	
" Q. B. N. S.	Queen's Bench.	
Lloyd & Goold (t. Sugden)		
& (t. Plunket)	Lloyd and Goold. Ch. (Ireland).	
Lofft	Lofft. K. B.	
Longf. & T.	Longfield and Townsend. Ex. (Ireland).	
Lower Can. Jur.	Lower Canada Jurist.	
Lowndes & M.	Lowndes and Maxwell. Bail Court.	
Lowndes, M. & P.	Lowndes, Maxwell and Pollock. Bail Court.	
L. R. A. & E.	} Law Reports, 1866 to 1875 inclusive.	
L. R. C. C.		
L. R. Ch.		
L. R. C. P.		
L. R. Eq.		
L. R. Exch.		
L. R. H. L.		
L. R. H. L. Sc. App. Cas. ..		
L. R. P. & D.		
L. R. P. C.		
L. R. P. D.		
L. R. Q. B.		
L. R. Ir.	Irish Law Reports (1879-1893).	
L. T. N. S.	Law Times. New Series.	
Lush.	Lushington. Adm.	
Lut.	Lutwyche. Registration.	
Lutw. Reg. Cas.	Lutwyche. C. P.	
10 B. R. C.		

Macl. & R.	Maclean and Robinson. Scotch Appeals.
M'Clel.	M'Cleland. Ex.
M'Clel. & Y.	M'Cleland and Young. Ex.
Macn. & G.	Macnaghten and Gordon. Ch.
Macpherson [3d Series, Court of Session Cases]	(Scotland).
Macq. H. L. Cas.	Macqueen. H. L. (Scotland).
Madd. Ch.	Maddock. Ch.
Manitoba L. Rep.	Manitoba Law Reports.
Mann. & G.	Manning and Granger. C. P.
Mann. & R.	Manning and Ryland. K. B.
Manson	Manson. Bky. and Winding-up.
Marsh.	Marshall. C. P.
Maule & S.	Maule and Selwyn. K. B.
Mees. & W.	Meeson and Welsby. Ex.
Meg.	Megone. Company Cases.
Meriv.	Merivale. Ch.
Mod.	Modern Reports.
Molloy	Molloy. Ch. (Ireland).
Montagu, Bankr. Cas.	Montagu. Bky.
Mont. & Ayr.	Montagu and Ayrton. Bky.
Mont. & B. Bankr.	Montagu and Bligh. Bky.
Mont. & C. Bankr.	Montagu and Chitty. Bky.
Mont. & M'Arth. Bankr. ...	Montagu and M'Arthur. Bky.
Mont. D. & De G.	Montagu, Deacon and De Gex. Bky.
Montreal L. Rep. S. C. or Montreal Law Reports. Superior Court or Q. B.	Queen's Bench.
Moody & M.	Moody and Malkin. Nisi Prius.
Moody & R.	Moody and Robinson. Nisi Prius.
Moody C. C.	Moody. Crown Cases.
Moore	Moore. C. P.
Moore & P.	Moore and Payne. C. P.
Moore & S.	Moore and Scott. C. P.
Moore Ind. App.	Moore. Indian Appeals.
Moore, P. C. C.	Moore. P. C.
Morrell	Morrell. Bky.
Morison's Dict.	Morison's Dictionary (Scotland).
Moseley	Moseley. Ch.
Murph. & H.	Murphy and Hurlstone. Ex.
Myl. & C.	Mylne and Craig. Ch.
Myl. & K.	Mylne and Keen. Ch.
N. B.	New Brunswick Reports.
N. B. Eq. Rep.	New Brunswick Equity Reports.
Nelson	Nelson. Ch.
Nev. & M.	Neville and Manning. K. B.
Nev. & P.	Neville and Perry. K. B.
Newfoundl. R.	Newfoundland Reports.
New Reports	New Reports (1862-1865).
New Sess. Cas.	New Sessions Cases.
New S. Wales St. R.	New South Wales State Reports.
New Zeal. L. R.	New Zealand L. R.
10 B. R. C.	

- Notes of Cases Notes of Cases (England).
 N. S. Nova Scotia Reports.
 N. S. W. L. R. New South Wales Law Reports.
 Noy. Eng. K. B.
- O. B. & F. N. Z. Ollivier, Bell & Fitzgerald (New Zealand).
 O'M. & H. O'Malley and Hardcastle. Election.
 Ont. App. Court of Appeal (Ontario).
 Ont. App. Rep. Appeal Reports (Ontario).
 Ont. Elec. Cas. Election Cases (Ontario).
 Ont. L. Rep. Ontario Law Reports (Current series).
 Ont. Pr. Rep. Practice Reports (Ontario).
 Ont. Rep. Ontario Reports.
- [1891] P Law Reports, Probate (1891 onwards).
 P. D. Law Reports, Probate Division (1876-1890).
 Paton H. L. Scotland.
 Patterson sc. App. Cas. Scotland.
 Peake, Add. Cas. Peake. Additional Cases, Nisi Prius.
 Peake, N. P. Cas. Peake. Nisi Prius.
 Perry & D. Perry and Davison. K. B.
 Perry & K. Perry and Knapp. Election.
 Phill. Ch. Phillips. Ch.
 Phillim. Eccl. Rep. Phillimore. Eccl.
 Plowd. Eng. K. B.
 Pol. Pollexfen. K. B.
 Popham Popham. K. B.
 Prec. in Ch. Precedents in Chancery.
 Pr. Edw. Isl. Prince Edward Island Reports.
 Price Price. Ex.
 P. Wms. Peere Williams. Ch.
- Q. B. Queen's Bench Reports (1841-1852).
 [1891] Q. B. Law Reports, Queen's Bench (1891 onwards).
 Q. B. D. Law Reports, Queen's Bench Division (1876-1890).
 Quebec Pr. Rep. Quebec Practice Reports.
 Queensl. L. R. Queensland Law Reports.
 Queensl. St. R. Queensland State Reports.
 Que. K. B. Quebec Reports, King's Bench.
- Railway & C. Cas. Railway and Canal Cases (1835-1854).
 Railway & C. Traffic Cas. Rly. and Canal Cases (1874 onwards).
 Rap. Jud. Quebec C. S. or B. R. Quebec Reports, Superior Courts.
 Rep. in Ch. Reports in Chancery.
 Reports The Reports, 1893-1895.
 Rettie [4th Series, Court of Session Cases]
 Revised Reports. Revised Reports.
 Rev. Legale L. C. Revue Legale (Quebec).
 Ridgew. L. & S. Ridgeway, Lapp & Schoales. K. B. (Ireland).
 Ridgew. P. C. Ridgeway. Parliamentary Cases.
 Robertson H. L. (Scotland).
 Robinson H. L. (Scotland).
- 10 B. R. C.

ABBREVIATIONS.

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Rolle Abr.	Rolle's Abridgment.
Rolle Rep.	Rolla. K. B.
Rose	Rose. Bky.
R. P. C.	Reports of Patent Cases.
Russ. & M.	Russell and Mylne. Ch.
Russ. & R. C. C.	Russell and Ryan. Crown Cases.
Russ. Ch.	Russell. Ch.
Russell (N. S.)	Russell's Equity Decisions (Nova Scotia).
Ryan & M.	Ryan and Moody. Nisi Prius.
Salk.	Salkeld. K. B.
Sask. L. R.	Saskatchewan Law Reports.
Sau. & Sc.	Sausse and Scully. Rolls Ct. (Ireland).
Saund.	Saunders. K. B.
S. Austr. L. R.	South Australian L. R.
Sayer	Sayer. K. B.
Sch. & Lef.	Schoales and Lefroy. Ch. (Ireland).
Scot. Jur.	Scottish Jurist.
Scot. L. T.	Scottish Law Times.
Scot. L. R.	Scottish Law Rep.
Scott	Scott. C. P.
Scott N. R.	Scott. New Reports, C. P.
Select Cas. Ch.	Select Cases in Chancery.
Selw. N. P.	Selwyn. Law of Nisi Prius.
Shaw [1st Series, Court of Session Cases]	H. L. (Scotland).
Shaw & M.	H. L. (Scotland).
[1907] S. C.	Scottish Court of Session Cases, New Series (1907 onwards).
Shower	Shower. K. B.
Shower P. C.	Shower. Parliamentary.
Sid.	Siderfin. K. B.
Sim.	Simons. Ch.
Sim. & Stu.	Simons and Stuart. Ch.
Smale & G.	Smale and Giffard. Ch.
Smith	Smith. K. B.
Smith	Smith. Registration.
Sol. Jo.	Solicitor's Journal.
Spinks Eccl. & Adm.	Adm.
Starkie	Starkie. Nisi Prius.
State Tr.	State Trials.
Strange	Strange. K. B.
Styles	Styles. K. B.
Swabey, Adm.	Swabey. Adm.
Swabey & T.	Swabey and Tristram. Probate.
Swanst.	Swanston. Ch.
Tamlyn	Tamlyn. Rolls Court.
T. & M.	Temple and Mew. Crown Cases.
Tasm. L. R.	Tasmanian L. R.
Taunt.	Taunton. C. P.
Term Rep.	Durnford and East. K. B.
10 B. R. O.	

Terr. L. Rep.	North-West Territories Reports.
Times L. R.	Times Law Reports.
T. Jones	Sir T. Jones. K. B.
Tothill	Tothill. Ch.
T. Raym.	Sir T. Raymond. K. B.
Turn. & R.	Turner and Russell. Ch.
Tyrw.	Tyrwhitt. Ex.
Tyrw. & G.	Tyrwhitt and Granger. Ex.
U. C. C. P.	Common Pleas Reports (Ontario).
U. C. C. P. D.	Common Pleas Division.
U. C. Err. & App.	Upper Canada Error and Appeal Reports.
U. C. L. J.	Upper Canada Law Journal.
U. C. Q. B.	Queen's Bench Reports (Ontario).
U. C. Q. B. O. S.	Old Series of King's and Queen's Bench Reports (Ontario).
Vent.	Ventris. K. B.
Vern.	Vernon. Ch.
Vern. & S.	Vernon and Scriven. K. B.
Ves. & B.	Vesey and Beames. Ch.
Ves. Jr.	Vesey, jun. Ch.
Ves. Sr.	Vesey, sen. Ch.
Vict. L. R.	Victorian Law Reports.
Vict. Rep.	Victorian Reports (Webb, A'Beckett, & Williams).
W. & W. Vict.	Wyatt & Webb (Victoria).
W. Bl.	Sir Wm. Blackstone. K. B.
Weekly Notes	London.
Week. Rep.	Weekly Reporter.
West	West. H. L.
West. Law Rep. (Can.)	Western Law Reporter.
Wightw.	Wightwick. Ex.
Willes Rep.	Willes. C. P.
Wilmot's Notes	Wilmot's Notes. K. B.
Wils.	Wilson. K. B.
Wils. Ch.	Wilson. Ch.
Wils. Ex.	Wilson. Ex.
Wilson & S.	H. L. (Scotland).
W. Jones	Sir W. Jones. K. B.
W. Kelynge	Sir W. Kelynge. Ch.
Wms.' Saund.	Williams' Saunders. K. B.
W. Rob.	W. Robison. Adm. (1838-1847).
W. W. & A'B. Vict.	Wyatt, Webb & A'Beckett (Victoria).
W. W. & D.	Wilmore, Wollaston and Davison. K. B.
W. W. & H.	Wilmore, Wollaston and Hodges. K. B.
Yelv.	Yelverton. K. B.
Younge & C. Ch. Cas.	Younge and Collyer. Ch.
Younge & C. Exch.	Younge and Collyer. Eq. Ex.
Younge & J.	Younge and Jervis. Ex.
Younge, Exch.	Younge. Ex. Eq.
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Dakin & Co. v. Lee, 10 B. R. C. 700—s. c. [1916] 1 K. B. 566, 84 L. J. K. B. N. S. 2031, 113 L. T. N. S. 903, 59 Sol. Jo. 650.
Dauncey v. Holloway, 3 B. R. C. 54—s. c. [1901] 2 K. B. 441, 70 L. J. K. B. N. S. 695, 49 Week. Rep. 546, 84 L. T. N. S. 649, 17 Times L. R. 493.
Davey v. Christoff, 10 B. R. C. 636—s. c. 36 Ont. L. Rep. 123, 28 D. L. R. 447.
v. Green, 7 B. R. C. 367—s. c. [1914] Vict. L. R. 594.
Davies v. Thomas, 10 B. R. C. 929—s. c. [1920] 2 Ch. 189, [1920] W. N. 181, 36 Times L. R. 571, 64 Sol. Jo. 529.
Davis v. Mayor of Bromley, 1 B. R. C. 345—s. c. [1908] 1 K. B. 170, 77 L. J. K. B. N. S. 51, 71 J. P. 513, 97 L. T. N. S. 705, 24 Times L. R. 11, 5 Local G. R. 1229.
v. Town Properties Invest. Corp. 6 B. R. C. 168—s. c. [1903] 1 Ch. 797, 72 L. J. Ch. N. S. 389, 51 Week. Rep. 417, 88 L. T. N. S. 665.
Daye, R. v.

- Dayer-Smith, Hadsley v.**
De Fries, Masson, Templier & Co. v.
De La Bere v. Pearson, 1 B. R. C. 21—s. c.
 [1908] 1 K. B. 280, 77 L. J. K. B. N. S. 380, 98 L. T. N. S. 71, 24 Times L. R. 120.
Delory v. Guyett, 10 B. R. C. 590—s. c. 47
 Ont. L. Rep. 137.
De Luca v. De Luca, 6 B. R. C. 570—s. c.
 12 N. S. Wales St. R. 619.
Denaby & C. Main Collieries v. Yorkshire Miners' Asso. 5 B. R. C. 452—s. c.
 [1906] A. C. 384, 75 L. J. K. B. N. S. 961, 95 L. T. N. S. 561, 22 Times L. R. 543.
Dent, MacMillan & Co. v.
De Pass v. Sonnenenthal. See Salaman, Re.
Derbyshire, Re, 5 B. R. C. 534—s. c. [1906]
 1 Ch. 135, 75 L. J. Ch. N. S. 95, 54 Week. Rep. 135, 94 L. T. N. S. 138.
Webb v.
De Rutzen, Whiting v.
Deverges v. Sandeman, C. & Co. 3 B. R. C. 902—s. c. [1902] 1 Ch. 579, 71 L. J. Ch. N. S. 328, 50 Week. Rep. 404, 86 L. T. N. S. 269, 18 Times L. R. 375.
Devonald v. Rosser & Sons, 2 B. R. C. 780—s. c. [1906] 2 K. B. 728, 75 L. J. K. B. N. S. 688, 95 L. T. N. S. 232, 22 Times L. R. 682.
Dibden v. Skirrow, 1 B. R. C. 333—s. c. [1908] 1 Ch. 41, 77 L. J. Ch. N. S. 107, 71 J. P. 555, 97 L. T. N. S. 658, 24 Times L. R. 70, 6 Local G. R. 108.
Dick, K. & Co., Metropolitan Water Bd. v. Dicksee, Ex parte, [1908] 2 K. B. 169. See Pope, Re.
Director of Public Prosecutions, Scott v.
Dixon v. Solicitor to the Treasury, 2 B. R. C. 534—s. c. [1905] P. 42, 74 L. J. Prob. N. S. 33, 92 L. T. N. S. 427, 21 Times L. R. 145.
Dominion Supply & Constr. Co. v. Foley Bros. 10 B. R. C. 775—s. c. 53
 Nova Scotia, 333.
Dominion Trust Co., Arnold v.
Donohue, Moss & Phillips v.
Douglas-Menzies v. Umpelby, 3 B. R. C. 509—s. c. [1908] A. C. 224, 77 L. J. P. C. N. S. 64, 98 L. T. N. S. 509, 24 Times L. R. 344.
Dover Coalfield Extension, Re, 1 B. R. C. 307—s. c. [1908] 1 Ch. 65, 77 L. J. Ch. N. S. 94, 98 L. T. N. S. 31, 24 Times L. R. 5, 15 Manson, 51.
Dovey v. Cory, 6 B. R. C. 179—s. c. [1901]
 A. C. 477, 70 L. J. Ch. N. S. 753, 50 Week. Rep. 65, 85 L. T. N. S. 257, 17 Times L. R. 732, 8 Manson 346.
10 B. R. C.
Dow v. Cassaigne. See Allan, Re.
Dowler, Re. See Fontaine, Re.
Driefontein Consol. Mines, Janson v.
Drummond, Re, 7 B. R. C. 172—s. c. [1914]
 2 Ch. 90, 83 L. J. Ch. N. S. 817, 111 L. T. N. S. 156, 30 Times L. R. 163, 53 Sol. Jo. 472.
Ashworth v.
Dublin Southern Dist. Tramways Co., Tobackin v.
Duder, British Dominions General Ins. Co. v.
Duke, Boyers & Co. v.
Dun, Macintosh v.
Duncan v. Scottish County Invest. Co. 8 B. R. C. 610—s. c. 52 Scot. L. R. 790.
Dunlop Pneumatic Tyre Co. v. Selfridge & Co. 8 B. R. C. 221—s. c. [1915]
 A. C. 847, W. N. 184, 84 L. J. K. B. N. S. 1680, 113 L. T. N. S. 386, 31 Times L. R. 309, 59 Sol. Jo. 430.
Dunn, Re, 2 B. R. C. 413—s. c. [1904] 1 Ch. 648, 73 L. J. Ch. N. S. 425, 52 Week. Rep. 345, 91 L. T. N. S. 135.
Dunnett, Re, 9 B. R. C. 73—s. c. 49 Scot L. R. 452.
Durant, Keighley, Maxsted & Co. v.
Dynamite Actien-Gesellschaft v. Rio Tinto Co. [1918] A. C. 260. See Ertel Bieber & Co. v. Rio Tinto Co.
Earl v. Lubbock, 6 B. R. C. 242—s. c. [1905] 1 K. B. 253, 74 L. J. K. B. N. S. 121, 53 Week. Rep. 145, 91 L. T. N. S. 830, 21 Times L. R. 71.
Eastern & South African Teleg. Co. v. Cape Town Tramways Companies, 2 B. R. C. 114—s. c. [1902] A. C. 381, 71 L. J. P. C. N. S. 122, 50 Week. Rep. 657, 86 L. T. N. S. 457, 18 Times L. R. 523.
East Indian R. Co. v. Mukerjee, 3 B. R. C. 420—s. c. [1901] A. C. 396, 70 L. J. P. C. N. S. 63, 84 L. T. N. S. 210, 17 Times L. R. 284.
Economic Life Assur. Soc. v. Osborne, 3 B. R. C. 159—s. c. [1902] A. C. 147, 71 L. J. Ch. N. S. 34, 85 L. T. N. S. 587.
Edison-Bell Consol. Phono. Co., National Phono. Co. v.
Edmondson v. Birch & Co. 1 B. R. C. 444—s. c. [1907] 1 K. B. 371, 76 L. J. K. B. N. S. 346, 96 L. T. N. S. 415, 23 Times L. R. 234.
Edwards, Child v.
Eichholz, Malzy v.
Eldridge, Hewett v.
Electrolytic Alkali Co., Northwestern Salt Co. v.

- Ella, The**, 8 B. R. C. 152—s. c. L. R. [1915] Prob. 111, 84 L. J. Prob. N. S. 97, 30 Times L. R. 566.
- Ellis v. Glover & Hobson**, 1 B. R. C. 692—s. c. [1908] 1 K. B. 388, 77 L. J. K. B. N. S. 251, 98 L. T. N. S. 110.
- Kent v. Ellworthy v. Ellworthy**, L. R. [1920] Prob. 126. See *Butterworth v. Butterworth*.
- Elwes v. Hopkins**, 2 B. R. C. 198—s. c. [1906] 2 K. B. 1, 75 L. J. K. B. N. S. 450, 70 J. P. 262, 94 L. T. N. S. 547, 4 L. G. R. 615, 21 Cox, C. C. 133.
- Embiricos v. Anglo-Austrian Bank**, 2 B. R. C. 294—s. c. [1905] 1 K. B. 677, 74 L. J. K. B. N. S. 326, 53 Week. Rep. 306, 92 L. T. N. S. 305, 21 Times L. R. 268, 10 Com. Cas. 99.
- Emlyn Jones & Williams, Anglo-Northern Trading Co. v.**
- Emmons, Mayor, Aldermen, and Burgesses of Wolverhampton v.**
- English v. Cliff**, 7 B. R. C. 444—s. c. [1914] 2 Ch. 376, 83 L. J. Ch. N. S. 850, 111 L. T. N. S. 751, 30 Times L. R. 599, 58 Sol. Jo. 687.
- English & Colonial Produce Co., Re**, 4 B. R. C. 748—s. c. [1906] 2 Ch. 435, 75 L. J. Ch. N. S. 831, 95 L. T. N. S. 85, 22 Times L. R. 669, 13 Manson, 337.
- Equitable Fire & Acci. Office v. Ching Wo Hong**, 1 B. R. C. 34—s. c. [1907] A. C. 96, 76 L. J. C. P. N. S. 31, 96 L. T. N. S. 1, 23 Times L. R. 200.
- Equity Fire Ins. Co., Thompson v.**
- Ertel Bieher & Co. v. Rio Tinto Co.** 8 B. R. C. 734—s. c. [1918] A. C. 260, 23 Com. Cas. 243, 118 L. T. N. S. 181, W. N. 22, 34 Times L. R. 208.
- Etherington, Re**, 6 B. R. C. 517—s. c. [1909] 1 K. B. 591, 7 L. J. K. B. N. S. 884, 100 L. T. N. S. 568, 25 Times L. R. 287, 53 Sol. Jo. 266.
- Evan Jones & Co., Powell & Thomas v.**
- Ewing v. Hewitt**, 7 B. R. C. 570—s. c. 27 Ont. App. Rep. 296.
- Express Engineering Works, Re**, 10 B. R. C. 629—s. c. [1920] 1 Ch. 466, [1920] W. N. 75, 36 Times L. R. 275.
- Fahey v. Jephcott**, 1 B. R. C. 616—s. c. 2 Ont. L. Rep. 440.
- Fanshaw v. Knowles**, 10 B. R. C. 25—s. c. [1916] 2 K. B. 538, 85 L. J. K. B. N. S. 1735, 115 L. T. N. S. 339.
- Farey v. Burvett**, 7 B. R. C. 628—s. c. 21 C. L. R. (Austr.) 433.
- Farrer v. Loveless**, [1918] 2 Ch. 1. See *Re Loveless*.
- Faulkner, Hildesheimer v.**
- 10 B. R. C.**
- Fenning Film Service v. Wolverhampton, W. & D. Cinemas**, 6 B. R. C. 730—s. c. [1914] 3 K. B. 1171, 83 L. J. K. B. N. S. 1860.
- Ferguson, Northwestern Nat. Bank v.**
- Ferguson's Will, Re**, 2 B. R. C. 552—s. c. [1902] 1 Ch. 483, 71 L. J. Ch. N. S. 360, 50 Week. Rep. 312.
- Ferrand, Bradford Corporation v.**
- File v. Unger**, 7 B. R. C. 1—s. c. 27 Ont. App. Rep. 468.
- Findlay v. Howard**, 9 B. R. C. 1064—s. c. 58 Can. S. C. 516.
- Finkbeiner v. Yeo**, 9 B. R. C. 460—s. c. 26 Manitoba L. R. 22.
- Fire & Acci. Office v. Ching Wo Hong**, [1907] A. C. 96. See *Equitable Fire & Acci. Office v. Ching Wo Hong*.
- Fitzgerald, Loveless v.**
- Fitzroy v. Cave**, 5 B. R. C. 601—s. c. [1905] 2 K. B. 364, 74 L. J. K. B. N. S. 829, 54 Week. Rep. 17, 93 L. T. N. S. 409, 21 Times L. R. 612.
- Fleming, Griffiths v.**
- Fletcher & Son v. Jubb, Booth & Helliwell**, 10 B. R. C. 1—s. c. [1920] 1 K. B. 275, 122 Times L. R. 258, 89 L. J. K. B. N. S. 236.
- Florence, Re**, 10 B. R. C. 48—s. c. 87 L. J. Ch. N. S. 86, 117 L. T. N. S. 701, 62 Sol. Jo. 87.
- Foley Bros., Dominion Supply & Constr. Co. v.**
- Foreign Hardwood Co., Braithwaite v.**
- Forsbacka Jernverks Aktiebolag, Okura & Co. v.**
- Forster v. Ivey**, 5 B. R. C. 614—s. c. 2 Ont. L. Rep. 480.
- Foster v. Brown**, 10 B. R. C. 918—s. c. 48 Ont. L. R. 1.
- Corby v.**
- v. New Trinidad Lake Asphalt Co.**
- 1 B. R. C. 959—s. c. [1901] 1 Ch. 208, 70 L. J. Ch. N. S. 123, 49 Week. Rep. 119, 17 Times L. R. 89, 8 Manson, 47.**
- Fountaine, Re**, 2 B. R. C. 654—s. c. [1909] 2 Ch. 382, 78 L. J. Ch. N. S. 648, 101 L. T. N. S. 83, 25 Times L. R. 689.
- v. Lord Amherst. See Fountaine, Re.**
- Francis, Alliance Assur. Co. v.**
- Fraser v. Sweet**, 2 B. R. C. 254—s. c. 13 Man. L. Rep. 147.
- Freeman, Stuart v.**
- Freudenberg, Porter v.**
- Fried Krupp Actien-Gesellschaft, Re**, 8 B. R. C. 673—s. c. [1917] 2 Ch. 188, 86 L. J. Ch. N. S. 689, 117 L. T. N. S. 21, 61 Sol. Jo. 593.
- Friendly Soc. of Operative Stonemasons, Read v.**

- Fullbrook, Tate v.
 Fulton, Saxby v.
 Gabriel & Sons v. Churchill, 6 B. R. C. 932—s. c. [1914] 3 K. B. 1272, 30 Times L. R. 658, 58 Sol. Jo. 740, 19 Com. Cas. 411.
 Gaddes, Kilgour v.
 Garner v. Wingrove, 3 B. R. C. 737—s. c. [1905] 2 Ch. 233, 74 L. J. Ch. N. S. 545, 53 Week. Rep. 588, 93 L. T. N. S. 131.
 Gas, Light & Coke Co., Kimber v.
 Gattward v. Knee, 4 B. R. C. 895—s. c. [1902] P. 99, 71 L. J. Prob. N. S. 34, 86 L. T. N. S. 119, 18 Times L. R. 163.
 General Acci. Assur. Corp. Scarr v.
 General Acci. Fire & Life Assur. Corp., Rogers v.
 General Bill Posting Co. v. Atkinson, 1 B. R. C. 497—s. c. [1909] A. C. 118, 78 L. J. Ch. N. S. 77, 99 L. T. N. S. 943, 25 Times L. R. 178.
 General Trading Co., Rawlings v.
 Gerson, Kaufman v.
 Gibbon v. Pease, 3 B. R. C. 460—s. c. [1905] 1 K. B. 810, 74 L. J. K. B. N. S. 502, 69 J. P. 209, 52 Week. Rep. 417, 92 L. T. N. S. 433, 21 Times L. R. 365, 3 L. G. R. 461.
 Gibbs, Re, 5 B. R. C. 136—s. c. [1907] 1 Ch. 465, 76 L. J. Ch. N. S. 238, 96 L. T. N. S. 423.
 Giblan v. National Amalgamated Laborers' Union, 1 B. R. C. 528—s. c. [1903] 2 K. B. 600, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708.
 Giddy, Smith v.
 Gilbey, Villar v.
 Gill v. Gill, 2 B. R. C. 544—s. c. [1909] P. 157, 78 L. J. Prob. N. S. 60, 100 L. T. N. S. 861, 25 Times L. R. 400, 53 Sol. Jo. 359.
 Wrigley v.
 Glamorgan Coal Co., South Wales Miners' Federation v.
 Glanvill, Marshall v.
 Glasgow Coal Co. v. Welsh, 10 B. R. C. 308—s. c. [1916] 2 A. C. 1, 85 L. J. P. C. N. S. 130, 114 L. T. N. S. 809, 32 Times L. R. 359, 60 Sol. Jo. 336, 9 B. W. C. C. 371, [1919] S. C. 141, 53 Scot. L. R. 311, [1916] W. C. & Ins. Rep. 79.
 Gloster v. Toronto Electric L. Co. 1 B. R. C. 786—s. c. 38 Can. S. C. 27.
 Glover & Hobson, Ellis v.
 Glyn v. Howell, 3 B. R. C. 405—s. c. [1909] 1 Ch. 666, 78 L. J. Ch. N. S. 391, 100 L. T. N. S. 324, 53 Sol. Jo. 269.
 Godfrey v. Cooper, 10 B. R. C. 134—s. c. 46 Ont. L. Rep. 565.
 10 B. R. C.
 Goldberg, Schaffenius v.
 Goldfarb v. Bartlett & Kremer, 10 B. R. C. 121—s. c. [1920] 1 K. B. 639, 122 L. T. N. S. 588, [1920] W. N. 15, 64 Sol. Jo. 210.
 Goldrei, F. & Son v. Sinclair & R. Chamber of Commerce, 9 B. R. C. 881—s. c. [1918] 1 K. B. 180, 87 L. J. K. B. N. S. 261, 118 L. T. N. S. 147, 34 Times L. R. 74.
 Goldthorpe, Chambers v.
 Goodhart v. Woodhead. See Greenwood, Re.
 Goods of Bramley, [1902] P. 106. See Bramley, Goods of.
 Goold Bicycle Co., Laishley v.
 Grace, S. & Co., Lloyd v.
 Graham, R. v. Richardson v.
 Gramophone Co., Addis v.
 Grand Trunk R. Co. v. James, 5 B. R. C. 168—s. c. 31 Can. S. C. 420.
 Grant Richards, Re, 4 B. R. C. 597—s. c. [1907] 2 K. B. 33, 76 L. J. K. B. N. S. 643, 96 L. T. N. S. 712, 23 Times L. R. 388, 14 Manson, 88.
 Great Northern R. Co., Adderley v.
 Great Western R. Co. v. Helps, 9 B. R. C. 213—s. c. [1918] A. C. 141, 87 L. J. K. B. N. S. 230, 118 L. T. N. S. 235, 34 Times L. R. 118, 62 Sol. Jo. 120.
 Norman v.
 Green, Re, 8 B. R. C. 125—s. c. [1914] 1 Ch. 134, 83 L. J. Ch. N. S. 248, 110 L. T. N. S. 58, 58 Sol. Jo. 185.
 Davey v.
 Greenhalgh, Pearl Life Assurance Co. v.
 Greenwood, Re, 7 B. R. C. 182—s. c. [1903] 1 Ch. 749, 72 L. J. Ch. N. S. 261, 51 Week. Rep. 358, 88 L. T. N. S. 212, 19 Times L. R. 180.
 Griffin, Mansell v.
 Griffiths v. Fleming, 2 B. R. C. 391—s. c. [1909] 1 K. B. 805, 78 L. J. K. B. N. S. 567, 100 L. T. N. S. 365, 21 Times L. R. 377, 53 Sol. Jo. 340.
 Grosvenor, Sibley v.
 Guaranty Trust Co. v. Hannay & Co. 9 B. R. C. 260—s. c. [1918] 2 K. B. 623, 87 L. J. K. B. N. S. 1223, 34 Times L. R. 427, 119 L. T. N. S. 321, 23 Com. Cas. 395.
 Guardian Assur. Co. v. Chicouani, 9 B. R. C. 175—s. c. 51 Can. S. C. 562.
 Guest, Keen & Nettlefolds, Price v.
 Gulliver, Lyons, Sons & Co. v.
 Guyett, Delory v.
 Haberdashers' Co., Lydall v.
 Hadsley v. Dayer-Smith, 6 B. R. C. 558—s. c. [1914] A. C. 979, 83 L. J. Ch. N. S. 770, 111 L. T. N. S. 479, 30 Times L. R. 521, 58 Sol. Jo. 554.

- Hadwell v. Righton**, 5 B. R. C. 115—s. c. [1907] 2 K. B. 345, 76 L. J. K. B. N. S. 891, 71 J. P. 499, 97 L. T. N. S. 133, 23 Times L. R. 548, 5 L. G. R. 881.
- Halifax v. Nova Scotia Car Works**, 3 B. R. C. 171—s. c. [1914] A. C. 902, 84 L. J. P. C. N. S. 17, 111 L. T. N. S. 1049.
- Halifax Tramway Co. O'Connor v.**
- Hall, Re**, 7 B. R. C. 983—s. c. L. R. [1914] Prob. 1, 83 L. J. Prob. N. S. 1, 109 L. T. N. S. 587, 30 Times L. R. 1, 59 Sol. Jo. 30.
- v. Knight & Baxter.** See **Hall, Re.**
- Halliday, R. v.**
- Hambro v. Burnand**, 5 B. R. C. 480—s. c. [1904] 2 K. B. 10, 73 L. J. K. B. N. S. 669, 52 Week. Rep. 583, 90 L. T. N. S. 803, 20 Times L. R. 398, 9 Com. Cas. 251.
- Hamlyn v. Houston & Co.** 5 B. R. C. 82—s. c. [1903] 1 K. B. 81, 72 L. J. K. B. N. S. 72, 87 L. T. N. S. 500, 19 Times L. R. 66.
- Handa, Monckton v.**
- Hannay & Co., Guaranty Trust Co. v.**
- Hannon, McLarty v.**
- Harburg India Rubber Co. v. Martin**, 3 B. R. C. 596—s. c. [1902] 1 K. B. 778, 71 L. J. K. B. N. S. 529, 50 Week. Rep. 449, 86 L. T. N. S. 505, 18 Times L. R. 428.
- Harding, Martin v.**
- Hardoon v. Belillos**, 3 B. R. C. 355—s. c. [1901] A. C. 118, 70 L. J. P. C. N. S. 9, 49 Week. Rep. 209, 83 L. T. N. S. 573, 17 Times L. R. 126.
- Harper, Ronald v.**
- Harrison v. Walker**, 9 B. R. C. 606—s. c. [1919] 2 K. B. 453.
- Harse v. Pearl Life Assur. Co.** 3 B. R. C. 832—s. c. [1904] 1 K. B. 558, 73 L. J. K. B. N. S. 373, 52 Week. Rep. 457, 90 L. T. N. S. 245, 20 Times L. R. 264.
- Hart v. Cooper**, 46 Ont. L. Rep. 565. See **Godfrey v. Cooper.**
- Hart & Co., Michael v.**
- Hartell v. Blackler**, 10 B. R. C. 478—s. c. [1920] 2 K. B. 161, 123 L. T. N. S. 171, [1920] W. N. 95.
- Hartley v. Rochdale**, 3 B. R. C. 993—s. c. [1908] 2 K. B. 594, 77 L. J. K. B. N. S. 884, 72 J. P. 343, 99 L. T. N. S. 275, 24 Times L. R. 625, 6 L. G. R. 858.
- Hastie, McGlynn v.**
- Hastings Corp. v. Letton**, 3 B. R. C. 617—s. c. [1908] 1 K. B. 378, 77 L. J. K. B. N. S. 149, 97 L. T. N. S. 582, 20 Times L. R. 456, 15 Manson, 58.
- Haworth, Prince v.**
- 10 B. R. C.**
- Hawthorne & Co., Canadian Cas. & B. Ins. Co. v.**
- Heath, Re**, 3 B. R. C. 967—s. c. [1907] 2 Ch. 270, 76 L. J. Ch. N. S. 450, 97 L. T. N. S. 41.
- v. Widgeon**, [1907] 2 Ch. 270. See **Heath, Re.**
- Heather, Worthing Corporation v.**
- Hedde v. Bank of Hamilton**, 6 B. R. C. 256—s. c. 17 B. C. 306.
- Helps, Great Western R. Co. v.**
- Henderson v. Arthur**, 3 B. R. C. 73—s. c. [1907] 1 K. B. 10, 76 L. J. K. B. N. S. 22, 95 L. T. N. S. 772, 23 Times L. R. 60.
- Herbert v. Samuel Fox & Co.** 7 B. R. C. 142—s. c. [1916] 1 A. C. 405, 85 L. J. K. B. N. S. 441, [1916] W. C. & Ins. Rep. 1, 114 L. T. N. S. 426, [1916] W. N. 34, 32 Times L. R. 261, 60 Sol. Jo. 237, 9 B. W. C. C. 164.
- Herd v. Weardale Steel, Coal & Coke Co.** 8 B. R. C. 886—s. c. [1915] A. C. 67, [1914] W. N. 289, 84 L. J. K. B. N. S. 121, 111 L. T. N. S. 660, 30 Times L. R. 620.
- Herdman v. Wheeler**, 5 B. R. C. 651—s. c. [1902] 1 K. B. 361, 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 Times L. R. 190.
- Hermann v. Charlesworth**, 3 B. R. C. 639—s. c. [1905] 2 K. B. 123, 74 L. J. K. B. N. S. 620, 54 Week. Rep. 22, 93 L. T. N. S. 284, 21 Times L. R. 368.
- Herts, Hooper v.**
- Hewett v. Eldridge**, [1915] 1 Ch. 810. See **Hewett's Settlement, Re.**
- Hewett's Settlement, Re**, 9 B. R. C. 198—s. c. [1915] 1 Ch. 810, [1915] W. N. 177, 84 L. J. Ch. N. S. 715, 113 L. T. N. S. 315, 59 Sol. Jo. 476.
- Hewitt, Ewing v.**
- Holliday v.**
- Hewson v. Shelley**, 7 B. R. C. 464—s. c. [1914] 2 Ch. 13, 83 L. J. Ch. N. S. 607, 110 L. T. N. S. 785, 30 Times L. R. 402, 58 Sol. Jo. 397.
- Higgins v. Beauchamp**, 6 B. R. C. 816—s. c. [1914] 3 K. B. 1192, 30 Times L. R. 687.
- Hilckes, Re**, 7 B. R. C. 708—s. c. [1917] 1 K. B. 48, 86 L. J. K. B. N. S. 204, [1916] Hansell, Bankr. R. 160, 115 L. T. N. S. 490, 33 Times L. R. 490.
- Hildesheimer v. Faulkner**, 1 B. R. C. 755—s. c. [1901] 2 Ch. 552, 70 L. J. Ch. N. S. 800, 49 Week. Rep. 708, 85 L. T. N. S. 322, 17 Times L. R. 737.

- Hill v. Winnipeg Electric R. Co.** 5 B. R. C. 691—s. c. 21 Manitoba L. R. 442.
- Hillyer v. St. Bartholomew's Hospital**, 9 B. R. C. 1—s. c. [1909] 2 K. B. 820, 78 L. J. K. B. N. S. 958, 101 L. T. N. S. 368, 25 Times L. R. 762, 53 Sol. Jo. 714.
- Hilt, Whiteley v.**
- Hippisley v. Knee Bros.** 5 B. R. C. 193—s. c. [1905] 1 K. B. 1, 74 L. J. K. B. N. S. 68, 92 L. T. N. S. 20, 21 Times L. R. 5.
- Hodgson v. Bates.** See Bates, Re.
- Hole, Sadgrove v.**
- Holland, Sarpy v.**
- Holliday v. Hewitt**, 8 B. R. C. 573—s. c. 15 N. S. W. St. Rep. 257.
- Holloway, Dauncey v.**
- Home Ins. Co. v. Victoria-Montreal F. Ins. Co.** 1 B. R. C. 178—s. c. [1907] A. C. 59, 76 L. J. P. C. N. S. 1, 95 L. T. N. S. 627, 23 Times L. R. 29.
- Hood v. Anchor Line**, 9 B. R. C. 1097—s. c. [1918] A. C. 837, 87 L. J. P. C. N. S. 156, 34 Times L. R. 550, 62 Sol. Jo. 680, 145 L. T. Jo. 186, 55 Scot. L. R. 605.
- Hooley Hill Rubber & Chemical Co. v. Royal Ins. Co.** 10 B. R. C. 194—s. c. [1920] 1 K. B. 257, 89 L. J. K. B. N. S. 179, [1920] W. C. & Ins. Rep. 31, 25 Com. Cas. 23, 122 L. T. N. S. 173, 36 Times L. R. 81.
- Hooper v. Herts**, 5 B. R. C. 150—s. c. [1906] 1 Ch. 549, 75 L. J. Ch. N. S. 253, 54 Week. Rep. 350, 94 L. T. N. S. 324, 13 Manson, 8.
- Hopkins, Elwes v.**
- Houghton v. Houghton**, 6 B. R. C. 585—s. c. L. R. [1903] Prob. 150, 72 L. J. Prob. N. S. 31, 89 L. T. N. S. 76, 19 Times L. R. 505, 52 Week. Rep. 272.
- Houston v. Burns**, 9 B. R. C. 948—s. c. [1918] A. C. 337, 87 L. J. P. C. N. S. 99, 118 L. T. N. S. 462, 34 Times L. R. 219 [1917] S. C. 591, 55 Scot. L. R. 208.
- Houston & Co., Hamlyn v.**
- Howard, Findlay v.**
v. Lightfoot. See Lacey, Re.
- Howatson v. Webb**, 4 B. R. C. 642—s. c. [1908] 1 Ch. 1, 77 L. J. Ch. N. S. 32, 97 L. T. N. S. 730.
- Howell, Glyn v.**
v. Howell, L. R. [1920] Prob. 126. See Butterworth v. Butterworth.
- Howlett v. Newington**, [1908] 1 Ch. 71. See Roby, Re.
- Huggett v. Miers**, 1 B. R. C. 97—s. c. [1908] 2 K. B. 278, 77 L. J. K. B. N. S. 710, 99 L. T. N. S. 326, 24 Times L. R. 582, 52 Sol. Jo. 481.
- 10 B. R. C.**
- Hugh Stevenson & Sons v. Aktiengesellschaft Für Cartonagen Industrie**, 7 B. R. C. 600—s. c. [1917] 1 K. B. 842.
- Hurst v. Picture Theaters**, 8 B. R. C. 856—s. c. [1915] 1 K. B. 1, 83 L. J. K. B. N. S. 1837, 111 L. T. N. S. 972, 30 Times L. R. 642, 58 Sol. Jo. 739.
- Hutchings v. National Life Assur. Co.** 5 B. R. C. 356—s. c. 37 Can. S. C. 124.
- Huth v. Huth**, 8 B. R. C. 135—s. c. [1915] 3 K. B. 32, W. N. 155, 84 L. J. K. B. N. S. 1307, 113 L. T. N. S. 145, 31 Times L. R. 350.
- Hyams v. Stuart King**, 6 B. R. C. 962—s. c. [1908] 2 K. B. 696, 77 L. J. K. B. N. S. 424, 24 Times L. R. 675, 52 Sol. Jo. 551.
- Hypatia, The**, 7 B. R. C. 828—s. c. L. R. [1917] Prob. 36, 116 L. T. N. S. 25.
- Ilford Gas Co., Ocean Accident & G. Corp. v. Ilford Park Estates v. Jacobs**, 1 B. R. C. 988—s. c. [1903] 2 Ch. 522, 72 L. J. Ch. N. S. 699, 89 L. T. N. S. 295, 19 Times L. R. 574.
- Imperial Bank v. Bank of Hamilton**, 4 B. R. C. 578—s. c. [1903] A. C. 49, 72 L. J. P. C. N. S. 1, 51 Week. Rep. 289, 87 L. T. N. S. 457, 19 Times L. R. 56.
- Indemnity Mut. M. Assur. Co., Yangtze Ins. Asso. v.**
- Indian & General Invest. Trust v. Borax Consolidated**, 10 B. R. C. 108—s. c. [1920] 1 K. B. 539, 89 L. J. K. B. N. S. 252, 122 L. T. N. S. 547.
- Ingall v. Brown**, [1904] 1 Ch. 120. See Brown, Re.
- Inman, Nash v.**
- Innes v. Kynoch**, 9 B. R. C. 478—s. c. [1919] A. C. 765, 121 L. T. N. S. 39, [1919] W. N. 118, 35 Times L. R. 392, 63 Sol. Jo. 444, 12 B. W. C. C. 78.
- Insurance Co., Re**, [1915] 2 Ch. 167. See United London & S. Ins. Co., Re.
- v. Agricultural Sav. & L. Co.** 33 Can. S. C. 94. See Liverpool & L. & G. Ins. Co. v. Agricultural Savings & Loan Co.
- v. Boulter, Davies & Co.** 39 Can. S. C. 558. See Canadian Cas. & B. Ins. Co. v. Boulter, Davies & Co.
- v. Duder.** See British Dominions General Ins. Co. v. Duder.
- Hooley Hill Rubber & Chemical Co. v.** [1920] 1 K. B. 257. See Hooley Hill Rubber & Chemical Co. v. Royal Ins. Co.
- v. Montreal Coal & T. Co.** 35 Can. S. C. 266. See Metropolitan Life Ins. Co. v. Montreal Coal & T. Co.

- Insurance Co. v. Victoria-Montreal F. Ins. Co.** [1907] A. C. 59. See *Home Ins. Co. v. Victoria-Montreal F. Ins. Co.*
- Iredale v. Loudon**, 3 B. R. C. 688—s. c. 40 Can. S. C. Rep. 313.
- Irving, North & South Wales Bank v. Ivey, Forster v.**
- Jackson, Re**, 4 B. R. C. 627—s. c. [1907] 2 Ch. 354, 76 L. J. Ch. N. S. 553.
- v. Jackson**, 3 B. R. C. 452—s. c. [1908] P. 308, 77 L. J. Prob. N. S. 147, 24 Times L. R. 674, 52 Sol. Jo. 535.
- Oakey v.**
- v. Ward**, [1907] 2 Ch. 354. See *Jackson, Re*.
- v. Watson & Sons**, 3 B. R. C. 182—s. c. [1909] 2 K. B. 193, 78 L. J. K. B. N. S. 587, 100 L. T. N. S. 799, 25 Times L. R. 454, 53 Sol. Jo. 447.
- Jacobs, Ilford Park Estates v. Jalland, Wagstaff v.**
- James, Grand Trunk R. Co. v.**
- James Laing & Sons v. Barclay, Curle, & Co.** 2 B. R. C. 635—s. c. [1908] A. C. 35, [1908] S. C. (H. L.) 1, 77 L. J. P. C. N. S. 33, 97 L. T. N. S. 816, 10 Asp. Mar. L. Cas. 583.
- Janson v. Driefontein Consol. Mines**, 5 B. R. C. 810—s. c. [1902] A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 Times L. R. 796, 7 Com. Cas. 268.
- Janvier v. Sweeney**, 9 B. R. C. 579—s. c. [1919] 2 K. B. 316.
- Jarrah Timber & W. P. Corp., Samuel v. Jefferson v. Paskell**, 10 B. R. C. 81—s. c. [1916] 1 K. B. 57, 85 L. J. K. B. N. S. 398, 113 L. T. N. S. 1180, 32 Times L. R. 69.
- Jephcott, Fahey v.**
- John Hornby & Sons v. Oxley.** See *Oxley, Re*.
- Johnson, Pearl Life Assur. Co. v.**
- Jones v. Jones**, 10 B. R. C. 511—s. c. [1910] 2 A. C. 481, 85 L. J. K. B. N. S. 1519, 115 L. T. N. S. 432, 32 Times L. R. 705, 81 Sol. Jo. 8.
- v. Lee**, 5 B. R. C. 127—s. c. 106 L. T. N. S. 123, 76 L. J. 137, 28 Times L. R. 92, 56 Sol. Jo. 125.
- v. Newtown**, 10 B. R. C. 623—s. c. [1920] 3 K. B. 381.
- v. Pritchard**, 3 B. R. C. 380—s. c. [1908] 1 Ch. 630, 77 L. J. Ch. N. S. 405, 98 L. T. N. S. 386, 24 Times L. R. 309.
- Watson v.**
- Jones & Sons v. Tankerville**, 5 B. R. C. 202—s. c. [1909] 2 Ch. 440, 78 L. J. Ch. N. S. 674, 101 L. T. N. S. 202, 25 Times L. R. 714.
- 10 B. R. C.**
- Jordan v. Jordan**, 6 B. R. C. 581—s. c. [1913] Vict. L. R. 72.
- Joseph Thorley v. Orchis S. S. Co.** See *Thorley v. Orchis S. S. Co.*
- Joynt v. Cycle Trade Pub. Co.** 3 B. R. C. 487—s. c. [1904] 2 K. B. 292, 73 L. J. K. B. N. S. 752, 91 L. T. N. S. 155.
- Jubb, Booth & Helliwell, Fletcher & Son v. Karberg & Co. v. Blythe, G. J. & Co.** See *Arnhold Karberg & Co. v. Blythe, G. J. & Co.*
- Kaufman v. Gerson**, 4 B. R. C. 414—s. c. [1904] 1 K. B. 591, 73 L. J. K. B. N. S. 320, 52 Week. Rep. 420, 90 L. T. N. S. 608, 20 Times L. R. 277.
- Keep, Bird v.**
- Keighley, Maxsted & Co. v. Durant**, 1 B. R. C. 351—s. c. [1901] A. C. 240, 70 L. J. K. B. N. S. 662, 84 L. T. N. S. 777, 17 Times L. R. 527.
- Kekewich, Stucley v.**
- Kemp v. Baerselman**, 2 B. R. C. 436—s. c. [1906] 2 K. B. 604, 75 L. J. K. B. N. S. 873.
- Kenderdine Realty Co., Merriam v.**
- Kennedy v. Kennedy**, 7 B. R. C. 435—s. c. [1914] A. C. 215, 83 L. J. P. C. N. S. 63, 109 L. T. N. S. 833, 51 Scot. L. R. 587.
- Kent v. Ellis**, 2 B. R. C. 721—s. c. 31 Can. S. C. 110.
- Kettlewell v. Refuge Assur. Co.** 3 B. R. C. 844—s. c. [1908] 1 K. B. 545, 77 L. J. K. B. N. S. 421, 97 L. T. N. S. 896, 24 Times L. R. 217, 52 Sol. Jo. 158.
- Kilgour v. Gaddes**, 4 B. R. C. 987—s. c. [1904] 1 K. B. 457, 73 L. J. K. B. N. S. 233, 52 Week. Rep. 438, 90 L. T. N. S. 604, 20 Times L. R. 240.
- Kimber v. Gas, Light & Coke Co.** 9 B. R. C. 674—s. c. [1918] 1 K. B. 439, 87 L. J. K. B. N. S. 651, 118 L. T. N. S. 562, 82 J. P. 125, 34 Times L. R. 260, 62 Sol. Jo. 329, 16 L. G. R. 280.
- King. For Crown cases naming King, Queen, Rex, or Reg. as a party, see R. v. Bailey**, 7 B. R. C. 996—s. c. 31 Can. S. C. 338.
- Kingsbury v. Walter**, 7 B. R. C. 775—s. c. [1901] A. C. 187, 70 L. J. Ch. N. S. 546, 84 L. T. N. S. 697.
- Kish v. Charles Taylor, Sons & Co.** 3 B. R. C. 266—s. c. [1912] A. C. 604, 81 L. J. K. B. N. S. 1027, 17 Com. Cas. 355, 106 L. T. N. S. 900, [1912] W. N. 144, 28 Times L. R. 425, 56 Sol. Jo. 518.

- Kish v. Taylor**, 2 B. R. C. 575—s. c. [1911] 1 K. B. 625, 80 L. J. K. B. N. S. 601, 103 L. T. N. S. 785, 27 Times L. R. 174, 16 Com. Cas. 59, 11 Asp. Mar. L. Cas. 544.
- Knee, Gattward v.**
- Knee Bros., Hippisley v.**
- Knight & Baxter, Hall v.**
- Knowles, Fanshaw v.**
- Kreglinger v. New Patagonia Meat & C. S. Co.** 6 B. R. C. 394—s. c. [1914] A. C. 25, 83 L. J. Ch. N. S. 79, 100 L. T. N. S. 802, 30 Times L. R. 114, 58 Sol. Jo. 97, 51 Scot. L. R. 843.
- v. Samuel & Rosenfeld.** See **Porter v. Freudenberg.**
- Krygger v. Williams**, 7 B. R. C. 586—s. c. 15 C. L. R. (Austr.) 366.
- Kynoch, Innes v.**
- La Banque Jacques-Cartier, Brigham v.**
- Lacey, Re**, 2 B. R. C. 265—s. c. [1907] 1 Ch. 330, 76 L. J. Ch. N. S. 316, 96 L. T. N. S. 306.
- Lacoste, Cedars Rapids Mfg. & Power Co. v.**
- Laing & Sons v. Barclay, Curle, & Co.** [1908] A. C. 35. See **James Laing & Sons v. Barclay, Curle, & Co.**
- Laishley v. Goidl Bicycle Co.** 1 B. R. C. 115—s. c. [1903] 6 Ont. L. Rep. 319, 23 Canadian Law Times Occ. N. 304, 2 Ont. Week. Rep. 780.
- Lake Erie & D. River R. Co., MacLaughlin v.**
- Lamson Store S. Co., British Cash & Parcel Conveyors v.**
- Lane, Walter v.**
- La Societe Anonyme De Remorquage A Helice v. Bennetts**, 3 B. R. C. 138—s. c. [1911] 1 K. B. 243, 80 L. J. K. B. N. S. 228, 27 Times L. R. 77, 16 Com. Cas. 24.
- Laurence, Montreal Light, H. & P. Co. v.**
- Lavell v. Richings**, 4 B. R. C. 475—s. c. [1906] 1 K. B. 480, 75 L. J. K. B. N. S. 287, 54 Week. Rep. 394, 94 L. T. N. S. 515, 22 Times L. R. 316.
- Lavere v. Smith's Falls Public Hospital**, 9 B. R. C. 13—s. c. 35 Ont. L. Rep. 98.
- Law v. Llewellyn**, 7 B. R. C. 234—s. c. [1906] 1 K. B. 487, 75 L. J. K. B. N. S. 320, 70 J. P. 220, 54 Week. Rep. 368, 94 L. T. N. S. 359.
- Lawes-Wittwonge, Re**, 8 B. R. C. 599—s. c. [1915] Ch. 408, W. N. 35, 84 L. J. Ch. N. S. 472, 112 L. T. N. S. 931.
- Lawford v. Bruce**, [1908] 2 Ch. 682. See **Bruce, Re.**
- Lawrence & Bullen v. Afalo & Cook**, 1 B. R. C. 314—s. c. [1904] A. C. 17, 73 L. J. Ch. N. S. 85, 52 Week. Rep. 369, 89 L. T. N. S. 569, 20 Times L. R. 42.
- Leatham, Quinn v.**
- 10 B. R. C.
- Lee, Dakin & Co. v.**
- Jones v.**
- Lee Kun, R. v.**
- Legge, Robbins v.**
- Leigh v. Taylor**, 6 B. R. C. 154—s. c. [1902] A. C. 157, 71 L. J. Ch. N. S. 272, 50 Week. Rep. 623, 86 L. T. N. S. 230, 18 Times L. R. 293.
- Leiston-Cum-Sizewell Urban Dist. Council.**
- Leiston Gas Co. v.**
- Leiston Gas Co. v. Leiston-Cum-Sizewell Urban Dist. Council**, 8 B. R. C. 559—s. c. [1916] 2 K. B. 428, 85 L. J. K. B. N. S. 1759, 115 L. T. N. S. 172, 80 J. P. 385, 32 Times L. R. 588, 60 Sol. Jo. 554, 14 L. G. R. 922.
- Lemon v. Charlton**, 9 B. R. C. 798—s. c. 46 N. B. 228.
- Le Nickel Société Anonyme, Countess of Warwick S. S. Co. v.**
- Leon, Manubens v.**
- Lesbini, R. v.**
- Leslie v. Leslie**, 3 B. R. C. 542—s. c. [1908] P. 99, 77 L. J. Prob. N. S. 23, 98 L. T. N. S. 62, 24 Times L. R. 148.
- v. Sheill**, 6 B. R. C. 738, [1914] 3 K. B. 607, 83 L. J. K. B. N. S. 1145, 111 L. T. N. S. 106, 30 Times L. R. 460, 58 Sol. Jo. 453.
- Letton, Hastings Corp. v.**
- Lewin v. Lewin**, 1 B. R. C. 556—s. c. 36 N. B. 365.
- Lewis, Re**, 6 B. R. C. 95—s. c. [1904] 2 Ch. 656, 73 L. J. Ch. N. S. 748, 91 L. T. N. S. 242, 53 Week. Rep. 393.
- v. Lewis.** See **Lewis, Re.**
- R. v.**
- Williams v.**
- Liebmann, Ex parte.** See **R. v. Vine Street Police Station.**
- Lightfoot, Howard v.**
- v. Maybery**, 7 B. R. C. 957—s. c. [1914] A. C. 782, 83 L. J. Ch. N. S. 627, 111 L. T. N. S. 300, 58 Sol. Jo. 609.
- Limond, Re**, 8 B. R. C. 206—s. c. [1915] 2 Ch. 240, W. N. 267, 84 L. J. Ch. N. S. 833, 113 L. T. N. S. 815, 59 Sol. Jo. 613.
- v. Cunliffe**, [1915] 2 Ch. 240. See **Limond, Re.**
- Lind, Lind Industrials Finance Syndicate v.**
- Lind Industrials Finance Syndicate v. Lind**, 8 B. R. C. 242—s. c. [1915] 2 Ch. 345, W. N. 282, 84 L. J. Ch. N. S. 892, 59 Sol. Jo. 651.
- Linneker, R. v.**
- Liverpool L. & G. Ins. Co. v. Agricultural Savings & L. Co.** 1 B. R. C. 592—s. c. 33 Can. S. C. 94.
- Llanelly Steel Co., Dafen Tinplate Co. v.**

- Llewellyn, Law v.**
Lloyd v. Grace, S. & Co. 5 B. R. C. 498—
 s. c. [1912] A. C. 716, 81 L. J. K. B. N. S. 1140, 107 L. T. N. S. 531, 28 Times L. R. 547, 56 Sol. Jo. 723.
v. Powell Duffryn Steam Coal Co. 6 B. R. C. 827—s. c. [1914] A. C. 733, 83 L. J. K. B. N. S. 1054, 111 L. T. N. S. 338, 30 Times L. R. 456, 58 Sol. Jo. 514, 7 B. W. C. C. 330.
Lloyd's Bank v. Cooke, 5 B. R. C. 666—
 s. c. [1907] 1 K. B. 794, 76 L. J. K. B. N. S. 666, 96 L. T. N. S. 715, 23 Times L. R. 429.
Loach, British Columbia Electric R. Co. v.
Logan v. Bank of Scotland, 6 B. R. C. 320—
 s. c. [1906] 1 K. B. 141, 75 L. J. K. B. N. S. 218, 54 Week. Rep. 270, 94 L. T. N. S. 153, 22 Times L. R. 187.
London & N. Estates Co. v. Schlesinger, 7 B. R. C. 809—s. c. [1916] 1 K. B. 20, 85 L. J. K. B. N. S. 369, 114 L. T. N. S. 74, 32 Times L. R. 78, 60 Sol. Jo. 223.
London & N. W. R. Co., Peel v.
London & P. M. & G. Ins. Co., Nickels & Co. v.
London City & Midland Bank, Curtice v.
London County Council v. Allen, 8 B. R. C. 87—s. c. [1914] 3 K. B. 642, 83 L. J. K. B. N. S. 1695, 111 L. T. N. S. 610, 12 L. G. R. 1003.
London General Omnibus Co., Clark v. Wing v.
London Joint Stock Bank v. Macmillan, 9 B. R. C. 720—s. c. [1918] A. C. 777, 119 L. T. N. S. 387, 34 Times L. R. 509, 62 Sol. Jo. 650, 23 Com. Cas. 415, 53 L. Jo. 242.
Lord Amherst, Fountaine v.
London, Iredale v.
Louie, R. v.
Loveless, Re, 9 B. R. C. 559—s. c. [1918] 2 Ch. 1, 87 L. J. Ch. N. S. 461, 119 L. T. N. S. 24, 34 Times L. R. 356, 62 Sol. Jo. 470.
Farrer v.
v. Fitzgerald, 2 B. R. C. 809—s. c. 42 Can. S. C. 254.
Lovibond & Sons, Martin v.
Levitt v. Attorney General for Nova Scotia, 1 B. R. C. 857—s. c. 33 Can. S. C. 350.
Lubbock, Earl v.
Lucas, Attorney General v.
Lucas & C. Gas & Water Bd., Re, 8 B. R. C. 1—s. c. [1909] 1 K. B. 16, 77 L. J. K. B. N. S. 1009, 99 L. T. N. S. 767, 72 J. P. 437, 24 Times L. R. 858, 6 L. G. R. 1106.
10 B. R. C.
Luckie v. Merry, 8 B. R. C. 923—s. c. [1915] 3 K. B. 83, W. N. 243, 84 L. J. K. B. N. S. 1388, 113 L. T. N. S. 667, 31 Times L. R. 466, 59 Sol. Jo. 544, 8 B. W. C. C. 447.
Lunness, Re, 10 B. R. C. 424—s. c. 46 Ont. L. Rep. 320.
Lydall v. Haberdashers' Co. 87 L. J. Ch. N. S. 86. See Florence, Re.
Lyons, Sons & Co. v. Gulliver, 7 B. R. C. 94—s. c. [1914] 1 Ch. 631, 83 L. J. Ch. N. S. 281, 110 L. T. N. S. 284, 78 J. P. 98, 30 Times L. R. 75, 58 Sol. Jo. 97, 12 L. G. R. 194.
Macbeth, North & South Wales Bank v. M'Dermott, Roche v.
McEacharn v. Colton, 2 B. R. C. 798—s. c. [1902] A. C. 104, 71 L. J. P. C. N. S. 20.
M'Ewan, Watson v.
McGlynn v. Hastie, 10 B. R. C. 62—s. c. 44 Ont. L. Rep. 190.
McGruther v. Pitcher, 3 B. P. C. 292—s. c. [1904] 2 Ch. 306, 73 L. J. Ch. N. S. 653, 20 Times L. R. 652, 53 Week. Rep. 138, 91 L. T. N. S. 678.
McGuire v. Union S. S. Co. 10 B. R. C. 161—s. c. 27 C. L. R. (Austr.) 570.
Macintosh v. Dun, 2 B. R. C. 203—s. c. [1908] A. C. 390, 77 L. J. P. C. N. S. 113, 99 L. T. N. S. 64, 24 Times L. R. 705, 52 Sol. Jo. 580.
v. Port Huron Petrified Brick Co. 7 B. R. C. 296—s. c. 27 Ont. App. Rep. 262.
MacIver, Bannatyne v.
Mackenzie, Cameron v.
McLarty v. Hannon, 7 B. R. C. 224—s. c. [1914] Vict. L. R. 526.
MacLaughlin v. Lake Erie & D. River R. Co. 3 B. R. C. 321—s. c. 3 Ont. L. R. 706.
Macleod, Bank of Scotland v.
Macmillan, London Joint Stock Bank v.
MacMillan & Co. v. Dent, 3 B. R. C. 647—
 s. c. [1907] 1 Ch. 107, 76 L. J. Ch. N. S. 136, 95 L. T. N. S. 730, 23 Times L. R. 45.
McNevin, Canadian R. Acci. Ins. Co. v.
McQuire v. Western Morning News Co. 3 B. R. C. 490—s. c. [1903] 2 K. B. 100, 72 L. J. K. B. N. S. 612, 51 Week. Rep. 689, 88 L. T. N. S. 757, 19 Times L. R. 471.
Malzy v. Eichholz, 10 B. R. C. 231—s. c. [1916] 2 K. B. 308, 85 L. J. K. B. N. S. 1132, 115 L. T. N. S. 9, 32 Times L. R. 506, 60 Sol. Jo. 511.
Manitoba Free Press Co. v. Nagy, 6 B. R. C. 497—s. c. 39 Can. S. C. 340.
Manor, The, 4 B. R. C. 500—s. c. [1907] P. 339, 96 L. T. N. S. 871.

- Mansell v. Griffin**, 1 B. R. C. 708—s. c. [1908] 1 K. B. 160, 947, 72 J. P. 6, 98 L. T. N. S. 51, 24 Times L. R. 67.
- v. Valley Printing Co.** 1 B. R. C. 187—s. c. [1908] 2 Ch. 441, 77 L. J. Ch. N. S. 742, 90 L. T. N. S. 464, 24 Times L. R. 802, 52 Sol. Jo. 660.
- Manser, Re**, 1 B. R. C. 923—s. c. [1905] 1 Ch. 68, 74 L. J. Ch. N. S. 95, 53 Week. Rep. 261, 92 L. T. N. S. 79.
- Manubens v. Leon**, 9 B. R. C. 225—s. c. [1919] 1 K. B. 208, 88 L. J. K. B. N. S. 311, 120 L. T. N. S. 279, [1918] W. N. 350, 35 Times L. R. 94, 63 Sol. Jo. 102.
- Marie Glaeser, The**, 5 B. R. C. 958—s. c. L. R. [1914] Prob. 218, 31 Times L. R. 8, 59 Sol. Jo. 8.
- Marks, Rondeau, L. G. & Co. v. Samuel**, 6 B. R. C. 476—s. c. [1904] 2 K. B. 287, 73 L. J. K. B. N. S. 587, 53 Week. Rep. 88, 90 L. T. N. S. 590, 20 Times L. R. 430.
- Marreco v. Richardson**, 1 B. R. C. 465—s. c. [1908] 2 K. B. 584, 77 L. J. K. B. N. S. 859, 99 L. T. N. S. 486, 24 Times L. R. 624, 52 Sol. Jo. 516.
- Marshall, Colonial Bank v. Glanvill**, 7 B. R. C. 621—s. c. [1917] 2 K. B. 87.
- Marten, Andersen v. Martin, Harburg India Rubber Co. v. Harding**. See Gibbs, Re.
- v. Lovibond & Sons**, 6 B. R. C. 466—s. c. [1914] 2 K. B. 227, 83 L. J. K. B. N. S. 806, 110 L. T. N. S. 455, 7 B. W. C. C. 243.
- v. Martin**, 9 B. R. C. 615—s. c. L. R. [1919] Prob. 283.
- v. Protective Asso.** 10 B. R. C. 660—s. c. 36 Ont. L. Rep. 19.
- R. v.**
- Mason, Mayor, Aldermen, & Burgesses of Tenby v. Masson, Templier & Co. v. De Fries**, 4 B. R. C. 601—s. c. [1909] 2 K. B. 831, 101 L. T. N. S. 476, 25 Times L. R. 784, 53 Sol. Jo. 744.
- Mathewson, Beatty v. Burns**, 9 B. R. C. 246—s. c. 50 Can. S. C. 115.
- Maurice v. Bennett**, [1915] Ch. 408. See Lawes-Wittenronge, Re.
- Maxsted & Co. v. Durant**, [1901] A. C. 240. See Keighley Maxsted & Co. v. Durant.
- Maybery, Lightfoot v. Mayor, Aldermen, and Burgesses of Tenby v. Mason**, 1 B. R. C. 282—s. c. [1908] 1 Ch. 457, 77 L. J. Ch. N. S. 230, 72 J. P. 89, 98 L. T. N. S. 349, 24 Times L. R. 254, 6 Local G. R. 233.
- 10 B. R. C.**
- Mayor, Aldermen, and Burgesses of Wolverhampton v. Emmons**, 6 B. R. C. 900—s. c. [1901] 1 Q. B. 515, 70 L. J. K. B. N. S. 429, 49 Week. Rep. 553, 84 L. T. N. S. 407, 17 Times L. R. 234.
- Mayor of Bromley, Davis v. Mehr, Canada Cycle & Motor Co. v. Meighen v. Pacaud**, 3 B. R. C. 529—s. c. 40 Can. S. C. 188.
- Mellor v. Walmesley**, 4 B. R. C. 728—s. c. [1905] 2 Ch. 164, 74 L. J. Ch. N. S. 475, 53 Week. Rep. 581, 93 L. T. N. S. 574, 21 Times L. R. 591.
- Mercantile F. Ins. Co., Rogers v. Merriam v. Kenderdine Realty Co.** 8 B. R. C. 899—s. c. 34 Ont. L. Rep. 556.
- Merry, Luckie v. Mersey R. Co., Attorney General ex rel. Birkenhead v. Merten's Patents, Re**. See Porter v. Freudenberg.
- Metcalf v. Williams**, [1914] 2 Ch. 61. See Williams, Re.
- Metcalf & Greig, Attorney General v. Metcalfe & Co., Bentley Bros. v. Metropolitan Life Ins. Co. v. Montreal Coal & T. Co.** 1 B. R. C. 298—s. c. 35 Can. S. C. 266, 25 Can. Law Times Occ. N. 4.
- Metropolitan Water Bd. v. Dick, K. & Co.** 8 B. R. C. 483—s. c. [1918] A. C. 119, 87 L. J. K. B. N. S. 370, 23 Com. Cas. 148, 34 Times L. R. 113, 16 L. G. R. 1, 117 L. T. N. S. 766, [1917] W. N. 352, 82 J. P. 61.
- Meyer, Re**, 3 B. R. C. 339—s. c. [1908] P. 353, 77 L. J. Prob. N. S. 150, 52 Sol. Jo. 716.
- Michael v. Hart & Co.** 7 B. R. C. 558—s. c. [1902] 1 K. B. 482, 71 L. J. K. B. N. S. 265, 50 Week. Rep. 308, 86 L. T. N. S. 474, 18 Times L. R. 254.
- Midland Express, Re**, 7 B. R. C. 82—s. c. [1914] 1 Ch. 41, 83 L. J. Ch. N. S. 153, 109 L. T. N. S. 697, 30 Times L. R. 38, 58 Sol. Jo. 47, 21 Manson, 34.
- Midland R. Co. v. Wright**, 4 B. R. C. 230—s. c. [1901] 1 Ch. 738, 70 L. J. Ch. N. S. 411, 49 Week. Rep. 474, 84 L. T. N. S. 225, 17 Times L. R. 261.
- Miers, Huggett v. Millar & Co. v. Taylor & Co.** 8 B. R. C. 414—s. c. [1916] 1 K. B. 402, 85 L. J. K. B. N. S. 346, 114 L. T. N. S. 216, 32 Times L. R. 161.
- Millard v. Toronto R. Co.** 9 B. R. C. 539—s. c. 31 Ont. L. Rep. 526.

- Milling & E. Co. v. Canadian P. R. Co.** 42 Can. S. C. 600. See *Alexander Brown M. & E. Co. v. Canadian P. R. Co.*
- Mills v. Brooker**, 9 B. R. C. 256—s. c. [1919] 1 K. B. 555, 17 L. G. R. 238, [1919] W. N. 66, 35 Times L. R. 261, 63 Sol. Jo. 431.
- v. Continental Bag & Paper Co.** 9 B. R. C. 940—s. c. 44 Ont. L. Rep. 71.
- Mills & Co., Piercy v.**
- Miners' Federation v. Glamorgan Coal Co.** [1905] A. C. 239. See *South Wales Miners' Federation v. Glamorgan Coal Co.*
- Moffatt, Boorstein v.**
- Monckton v. Hands.** See *Swain, Re.*
- Monti v. Barnes**, 1 B. R. C. 968—s. c. [1901] 1 Q. B. 205, 70 L. J. Q. B. N. S. 225, 47 Week. Rep. 147, 83 L. T. N. S. 619, 17 Times L. R. 88.
- Montreal Coal & T. Co., Metropolitan L. Ins. Co. v.**
- Montreal Light, H. & P. Co. v. Laurence**, 4 B. R. C. 494—s. c. 39 Can. S. C. 326.
- Moore v. Wingfield**, [1903] 2 Ch. 411. See *Wilmer's Trusts, Re.*
- Morel Bros. & Co. v. Westmorland**, 7 B. R. C. 385—s. c. [1904] A. C. 11, 73 L. J. K. B. N. S. 93, 52 Week. Rep. 353, 89 L. T. N. S. 712, 20 Times L. R. 38.
- Morgan v. Avenue Realty Co.** 6 B. R. C. 445—s. c. 46 Can. S. C. 589.
- Morris, Re**, 2 B. R. C. 46—s. c. [1908] 1 K. B. 473, 77 L. J. K. B. N. S. 265, 98 L. T. N. S. 500.
- v. Baron & Co.** 9 B. R. C. 399—s. c. [1918] A. C. 1, 87 L. J. K. B. N. S. 145, 118 L. T. N. S. 34.
- Morrison, Jones, & Taylor, Re**, 7 B. R. C. 195—s. c. [1914] 1 Ch. 50, 109 L. T. N. S. 722, 30 Times L. R. 59, 58 Sol. Jo. 80.
- Cookes v. Robb v.**
- Morton, Varner v.**
- Moss & Phillips v. Donohoe**, 7 B. R. C. 889—s. c. 20 C. L. R. (Austr.) 580.
- Moss's Empires, Williams v.**
- Moulis v. Owen**, 4 B. R. C. 352—s. c. [1907] 1 K. B. 746, 76 L. J. K. B. N. S. 396, 96 L. T. N. S. 596, 23 Times L. R. 348.
- Muhesa Rubber Plantations, Ex parte.** See *Hickes, Re.*
- Muir v. Archdall**, 10 B. R. C. 559—s. c. 19 New So. Wales 10.
- Mukerjee, East Indian R. Co. v.**
- Mumford, Pennsylvania Co. v.**
- Murray, R. v.**
- 10 B. R. C.
- Musgrove v. Pandelis**, 9 B. R. C. 663—s. c. [1919] 2 K. B. 43, 120 L. T. N. S. 601, [1919] W. N. 79, 35 Times L. R. 219, 63 Sol. Jo. 353.
- Nagy, Manitoba Free Press Co. v.**
- Nash v. Inman**, 1 B. R. C. 143—s. c. [1908] 2 K. B. 1, 77 L. J. K. B. N. S. 626, 98 L. T. N. S. 658, 24 Times L. R. 401, 52 Sol. Jo. 335.
- National Amalgamated Laborers' Union, Gibian v.**
- National Life Assur. Co., Hutchings v.**
- National M. L. Asso., Australian W. F. L. A. Soc. v.**
- National Phonograph Co. v. Edison-Bell Consol. Phono. Co.** 6 B. R. C. 42—s. c. [1908] 1 Ch. 335, 77 L. J. Ch. N. S. 218, 98 L. T. N. S. 291, 24 Times L. R. 201.
- National Soc. for Prevention of Cruelty to Children v. Scottish Nat. Soc. for Prevention of Cruelty to Children**, 8 B. R. C. 839—s. c. [1915] A. C. 207, [1914] W. N. 316, 84 L. J. P. C. N. S. 869, 30 Times L. R. 657, 58 Sol. Jo. 720.
- New Belgium (Transvaal) Land & Development Co., Transvaal Lands Co. v.**
- Newham, Austin v.**
- Newington, Howlett v.**
- New Patagonia Meat & C. S. Co., Kreglinger v.**
- Newton, Price v.**
- Newtown, Jones v.**
- New Trinidad Lake Asphalt Co., Foster v.**
- Nickels & Co. v. London & P. M. & G. Ins. Co.** 5 B. R. C. 1—s. c. 70 L. J. Q. B. N. S. 29, 17 Times L. R. 54, 6 Com. Cas. 15.
- Nightingale v. Parsons**, 6 B. R. C. 783—s. c. [1914] 2 K. B. 621, 83 L. J. K. B. N. S. 742, 110 L. T. N. S. 806.
- Nisbet, Re**, 3 B. R. C. 844—s. c. [1906] 1 Ch. 386, 75 L. J. Ch. N. S. 238, 54 Week. Rep. 286, 94 L. T. N. S. 297, 22 Times L. R. 234.
- Norman v. Great Western R. Co.** 8 B. R. C. 972—s. c. [1915] 1 K. B. 584, [1914] W. N. 415, 84 L. J. K. B. N. S. 598, 112 L. T. N. S. 266, 31 Times L. R. 53.
- North & South Wales Bank v. Irvine**, [1908] A. C. 137. See *North & South Wales Bank v. Macbeth.*
- v. Macbeth**, 3 B. R. C. 748—s. c. [1908] A. C. 137, 77 L. J. K. B. N. S. 464, 98 L. T. N. S. 470, 24 Times L. R. 397, 13 Com. Cas. 219, 52 Sol. Jo. 353, 354.
- North Eastern R. Co., Sidney v.**
- Northwestern Nat. Bank v. Ferguson**, 9 B. R. C. 963—s. c. 57 Can. S. C. 420

- Northwestern Salt Co. v. Electrolytic Alkali Co.** 7 B. R. C. 530—s. c. [1914] A. C. 461, 83 L. J. K. B. N. S. 530, 110 L. T. N. S. 852, 30 Times L. R. 313, 58 Sol. Jo. 338.
- Nova Scotia Car Works, Halifax v. Nugent v. Nugent,** 1 B. R. C. 405—s. c. [1908] 1 Ch. 546, 77 L. J. Ch. N. S. 271, 98 L. T. N. S. 354, 24 Times L. R. 296, 52 Sol. Jo. 262.
- Nussey v. Provincial Bill Posting Co.** 2 B. R. C. 425—s. c. [1900] 1 Ch. 734, 78 L. J. Ch. N. S. 539, 100 L. T. N. S. 687, 25 Times L. R. 489, 53 Sol. Jo. 418.
- Nye, Restell v. Oakley v. Jackson,** 6 B. R. C. 460—s. c. [1914] 1 K. B. 216, 83 L. J. K. B. N. S. 712, 110 L. T. N. S. 41, 78 J. P. 87, 30 Times L. R. 92, 23 Cox, C. C. 734, 12 L. G. R. 248.
- Ocean Accident & G. Corp. v. Ilford Gas Co.** 6 B. R. C. 84—s. c. [1905] 2 K. B. 493, 74 L. J. K. B. N. S. 799, 93 L. T. N. S. 381, 21 Times L. R. 610.
- O'Connor v. Halifax Tramway Co.** 1 B. R. C. 427—s. c. 37 Can. S. C. 523.
- Odessa, The,** 5 B. R. C. 279—s. c. [1916] 1 A. C. 145.
- Okura & Co. v. Forsbacka Jernverks Aktiebolag,** 6 B. R. C. 792—s. c. [1914] 1 K. B. 715, 83 L. J. K. B. N. S. 561, 110 L. T. N. S. 464, 30 Times L. R. 242, 58 Sol. Jo. 232.
- O'Meara, R. v. Optima, The,** 2 B. R. C. 62—s. c. 74 L. J. Prob. N. S. 94, 93 L. T. N. S. 638, 10 Asp. Mar. L. Cas. 147.
- Orchis S. S. Co., Thorley v. Osborné, Amalgamated Soc. of Ry. Servants v. Ottawa Gas Co., Re,** 9 B. R. C. 922—s. c. 45 Ont. L. Rep. 617.
- Owen, Moufis v. Oxley, Re,** 7 B. R. C. 504—s. c. [1914] 1 Ch. 604, 83 L. J. Ch. N. S. 442, 110 L. T. N. S. 626, 30 Times L. R. 327, 58 Sol. Jo. 319.
- John Hornby & Sons v. Pacaud, Meighen v. Pandelis, Musgrove v. Parker v. R.** 3 B. R. C. 68—s. c. 14 C. L. R. Austr. 681.
- Parsons, Nightingale v. Petty v. Pash v. Victorian Stevedoring & General Contracting Co.** 10 B. R. C. 325—s. c. [1920] Vict. L. R. 35.
- Paskell, Jefferson v. Pearce, Re,** 8 B. R. C. 279—s. c. [1914] 1 Ch. 254, 83 L. J. Ch. N. S. 266, 110 L. T. N. S. 168, 58 Sol. Jo. 197.
- 10 B. R. C.**
- Pearl Life Assur. Co. v. Greenhalgh,** [1909] 2 K. B. 288. See Pearl Life Assur. Co. v. Johnson.
- Harse v. v. Johnson,** 4 B. R. C. 460—s. c. [1909] 2 K. B. 288, 78 L. J. K. B. N. S. 777, 100 L. T. N. S. 483, 73 J. P. 216.
- Pearson, Re,** 10 B. R. C. 554—s. c. [1920] 1 Ch. 247, 89 L. J. Ch. N. S. 123, 122 L. T. N. S. 515.
- v. Calder,** 8 B. R. C. 816—s. c. 35 Ont. L. Rep. 524.
- De La Bere v. Smith v. v. The Company.** See Midland Express, Re.
- Pease, Gibbon v. Peck v. Peck,** 7 B. R. C. 264—s. c. 35 N. B. 484.
- Peel v. London & N. W. R. Co.** 3 B. R. C. 120—s. c. [1907] 1 Ch. 5, 76 L. J. Ch. N. S. 152, 95 L. T. N. S. 897, 23 Times L. R. 85, 14 Manson, 30.
- Pennsylvania Co. v. Mumford,** 10 B. R. C. 895—s. c. [1920] 2 K. B. 537, 123 L. T. N. S. 248, [1920] W. N. 130, 36 Times L. R. 423.
- Pepin v. Bruyère,** 7 B. R. C. 454—s. c. [1902] 1 Ch. 24, 71 L. J. Ch. N. S. 39, 85 L. T. N. S. 461, 50 Week. Rep. 34.
- Percival v. Wright,** 4 B. R. C. 786—s. c. [1902] 2 Ch. 421, 71 L. J. Ch. N. S. 846, 51 Week. Rep. 31, 18 Times L. R. 697, 9 Manson, 443.
- Perera v. Perera,** 2 B. R. C. 33—s. c. [1901] A. C. 354, 70 L. J. P. C. N. S. 46, 84 L. T. N. S. 371, 17 Times L. R. 389.
- Perpetual Trustee Co., Wise v. Perry, R. v. Petty v. Parsons,** 7 B. R. C. 245—s. c. [1914] 2 Ch. 653, 30 Times L. R. 655, 58 Sol. Jo. 721, 741.
- Phillips v. Brooks,** 9 B. R. C. 517—s. c. [1919] 2 K. B. 243, 24 Com. Cas. 263, [1919] W. N. 139, 35 Times L. R. 470.
- Pickney, R. v. Picture Theaters, Hurst v. Piercy v. Mills & Co.** 10 B. R. C. 11—s. c. [1920] 1 Ch. 77, 88 L. J. Ch. N. S. 509, 122 L. T. N. S. 20, [1919] W. N. 254, 35 Times L. R. 703.
- Pitcher, McGruther v. Pitt & Co., Ward v. Plumb v. Cobden Flour Mills Co.** 7 B. R. C. 128—s. c. [1914] A. C. 62, 83 L. J. K. B. N. S. 197, 109 L. T. N. S. 759, 30 Times L. R. 174, 58 Sol. Jo. 184, 7 B. W. C. C. 1, 51 Scot. L. R. 661.

- Plummer, R. v.**
Pope, Re, 4 B. R. C. 775—s. c. [1908] 2 K. B. 169, 77 L. J. K. B. N. S. 767, 98 L. T. N. S. 775, 24 Times L. R. 556, 52 Sol. Jo. 458, 15 Manson, 201.
- Porter v. Freudenberg, 5 B. R. C. 548**—s. c. [1915] 1 K. B. 857, 112 L. T. N. S. 313, 84 L. J. K. B. N. S. 1001, 20 Com. Cas. 189, 32 R. P. C. 109, [1915] W. N. 43, 31 Times L. R. 162, 59 Sol. Jo. 216.
- Port Huron Petrified Brick Co., McIntosh v. Potter, Barron v.**
v. Berry. See Barron v. Potter.
- Poulton v. Adjustable Cover & B. B. Co. 6 B. R. C. 713**—s. c. [1908] 2 Ch. 430, 77 L. J. Ch. N. S. 780, 24 Times L. R. 782, 52 Sol. Jo. 639, 25 R. P. C. 661.
- Powell & Thomas v. Evan Jones & Co. 3 B. R. C. 252**—s. c. [1905] 1 K. B. 11, 21 Times L. R. 55, 74 L. J. K. B. N. S. 115, 53 Week. Rep. 277, 92 L. T. N. S. 430, 10 Com. Cas. 36.
- Powell Duffryn Steam Coal Co., Lloyd v. Pratt v. British Medical Asso. 9 B. R. C. 982**—s. c. [1919] 1 K. B. 244, 88 L. J. K. B. N. S. 628, 120 L. T. N. S. 41, 35 Times L. R. 14, 63 Sol. Jo. 84.
- Premier Oil & Pipe Line Co., Robson v. Prentice Bros., Stearn v.**
Price, Re, 5 B. R. C. 529—s. c. [1905] 2 Ch. 55, 74 L. J. Ch. N. S. 437, 53 Week. Rep. 600, 93 L. T. N. S. 44.
v. Guest, Keen & Nettlefolds, 9 B. R. C. 317—s. c. [1918] A. C. 760, 87 L. J. K. B. N. S. 801, 119 L. T. N. S. 345, 34 Times L. R. 494, 62 Sol. Jo. 619.
v. Newton. See Price, Re.
- Price & Co. v. Union Lighterage Co. 6 B. R. C. 119**—s. c. [1904] 1 K. B. 412, 73 L. J. K. B. N. S. 222, 52 Week. Rep. 325, 89 L. T. N. S. 731, 20 Times L. R. 177, 9 Com. Cas. 120.
- Prince v. Haworth, 2 B. R. C. 629**—s. c. [1905] 2 K. B. 768, 92 L. T. N. S. 773, 21 Times L. R. 402, 75 L. J. K. B. N. S. 92, 54 Week. Rep. 249.
- Pritchard, Jones v.**
Prosser, Smith v.
Protective Asso., Martin v.
Provincial Bill Posting Co., Nussey v.
Queen. For Crown cases naming King, Queen, Rex or Reg. as a party, see R. v.
- 10 B. R. C.**
- Quinn v. Leatham, 1 B. R. C. 197**—s. c. [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749.
- R. v. Baskerville, 10 B. R. C. 337**—s. c. [1916] 2 K. B. 658, 115 L. T. N. S. 453, 80 J. P. 446, 60 Sol. Jo. 696.
- v. Bond, 9 B. R. C. 92**—s. c. [1906] 2 K. B. 389, 75 L. J. K. B. N. S. 693, 70 J. P. 424, 54 Week. Rep. 586, 95 L. T. N. S. 296, 22 Times L. R. 633.
- v. Brooks, 1 B. R. C. 725**—s. c. 9 B. C. 13.
- v. Cahill, 2 B. R. C. 465**—s. c. 35 N. B. 240.
- v. Daye, 3 B. R. C. 211**—s. c. [1908] 2 K. B. 333, 77 L. J. K. B. N. S. 659, 72 J. P. 269, 99 L. T. N. S. 165.
- v. Graham, 9 B. R. C. 129**—s. c. [1915] Vict. L. R. 402.
- v. Halliday, 7 B. R. C. 722**—s. c. [1917] A. C. 260.
- v. Lee Kun, 9 B. R. C. 1122**—s. c. [1916] 1 K. B. 337, 85 L. J. K. B. N. S. 515, 114 L. T. N. S. 421, 80 J. P. 166, 32 Times L. R. 225, 60 Sol. Jo. 158.
- v. Lesbini, 7 B. R. C. 272**—s. c. [1914] 3 K. B. 1116, 84 L. J. K. B. N. S. 1102, 112 L. T. N. S. 175.
- v. Lewis, 1 B. R. C. 732**—s. c. 6 Ont. L. Rep. 132.
- v. Linneker, 3 B. R. C. 237**—s. c. [1906] 2 K. B. 99, 75 L. J. K. B. N. S. 385, 70 J. P. 293, 54 Week. Rep. 494, 94 L. T. N. S. 856, 22 Times L. R. 495, 21 Cox, C. C. 196.
- v. Louie, 2 B. R. C. 912**—s. c. 10 B. C. 1.
- v. Martin, 2 B. R. C. 336**—s. c. 9 Ont. L. R. 218.
- v. Murray, 3 B. R. C. 775**—s. c. [1906] 2 K. B. 385, 75 L. J. K. B. N. S. 593, 70 J. P. 295, 95 L. T. N. S. 295, 22 Times L. R. 596.
- v. O'Meara, 8 B. R. C. 595**—s. c. 34 Ont. L. Rep. 467.
- Parker v.**
v. Perry, 6 B. R. C. 231—s. c. [1909] 2 K. B. 697, 78 L. J. K. B. N. S. 1034, 101 L. T. N. S. 127, 73 J. P. 456, 25 Times L. R. 676, 53 Sol. Jo. 810.
- v. Pickney, 4 B. R. C. 804**—s. c. [1904] 2 K. B. 84, 73 L. J. K. B. N. S. 448, 68 J. P. 361, 52 Week. Rep. 513, 90 L. T. N. S. 468, 20 Times L. R. 363.

- R. v. Plummer, 4 B. R. C. 917**—s. c. [1902] 2 K. B. 339, 71 L. J. K. B. N. S. 805, 66 J. P. 647, 86 L. T. N. S. 836, 18 Times L. R. 659, 51 Week. Rep. 137, 20 Cox, C. C. 243.
- v. Robinson, 8 B. R. C. 587**—s. c. [1915] 2 K. B. 342, W. N. 133, 84 L. J. K. B. N. S. 1149, 113 L. T. N. S. 379, 79 J. P. 303, 31 Times L. R. 313, 59 Sol. Jo. 336.
- v. Russell, 10 B. R. C. 836**—s. c. 51 D. L. R. 1.
- v. Seery, 8 B. R. C. 165**—s. c. 19 C. L. R. (Austr.) 15.
- v. Stubbs, 8 B. R. C. 953**—s. c. 25 D. L. R. 424, 9 Alberta L. R. 26.
- v. Tibbits, 2 B. R. C. 469**—s. c. [1902] 1 K. B. 77, 50 Week. Rep. 125, 85 L. T. N. S. 521, 18 Times L. R. 49, 71 L. J. K. B. N. S. 4, 66 J. P. 4.
- v. Tideswell, 1 B. R. C. 997**—s. c. [1905] 2 K. B. 273, 74 L. J. K. B. N. S. 725, 69 J. P. 318, 93 L. T. N. S. 111, 21 Times L. R. 531, 21 Cox, C. C. 10.
- v. Todd, 1 B. R. C. 883**—s. c. 13 Manitoba L. Rep. 364.
- Union Colliery Co. v.**
- v. Vine Street Police Station, 7 B. R. C. 868**—s. c. [1916] 1 K. B. 268, 85 L. J. K. B. N. S. 210, 113 L. T. N. S. 971, 80 J. P. 49, 32 Times L. R. 3.
- West Rand Cent. Gold Min. Co. v.**
- v. Willis, 10 B. R. C. 612**—s. c. [1916] 1 K. B. 933, 85 L. J. K. B. N. S. 1729, 114 L. T. N. S. 1047, 80 J. P. 279, 32 Times L. R. 452, 60 Sol. Jo. 514.
- Railway Co., Adderley v. [1905] 2 I. R. 378.** See Adderley v. Great Northern R. Co.
- v. Amalgamated Soc. of Ry. Servants, [1901] A. C. 426.** See Taff Vale R. Co. v. Amalgamated Soc. of Ry. Servants.
- v. Helps, [1918] A. C. 141.** See Great Western R. Co. v. Helps.
- v. Loach, [1916] A. C. 719.** See British Columbia Electric R. Co. v. Loach.
- v. Mukerjee, [1901] A. C. 396.** See East Indian R. Co. v. Kalidas Mukerjee.
- v. Railway Co. 59 Can. S. C. 352.** See Winnipeg Electric R. Co. v. Canadian N. R. Co.
- v. Wright, [1901] 1 Ch. 738.** See Midland R. Co. v. Wright.
- Railway Servants v. Osborne, [1910] A. C. 87.** See Amalgamated Soc. of Ry. Servants v. Osborne.
- 10 B. R. C.**
- Ramsay & Co., Andrews v.**
- Ravenscroft, Spence v.**
- Rawlings v. General Trading Co. 10 B. R. C. 278**—s. c. [1921] 1 K. B. 635.
- Read v. Friendly Soc. of Operative Stonemasons, 1 B. R. C. 503**—s. c. [1902] 2 K. B. 732, 71 L. J. K. B. N. S. 994, 51 Week. Rep. 115, 87 L. T. N. S. 493, 19 Times L. R. 20, 66 J. P. 822.
- Redford, Armstrong, W. & Co. v.**
- Refuge Assur. Co., Kettlewell v.**
- Reg. See R. v.**
- Registered Trademark No. 37,760, Re, 1 B. R. C. 640**—s. c. [1908] 1 Ch. 513, 77 L. J. Ch. N. S. 298, 98 L. T. N. S. 121, 25 R. P. C. 156.
- Restell v. Nye, [1901] 1 K. B. 624.** See Chambers v. Goldthorpe.
- Rex. See R. v.**
- Reynolds v. Ashby & Son, 1 B. R. C. 653**—s. c. [1904] A. C. 466, 73 L. J. K. B. N. S. 946, 20 Times L. R. 766, 53 Week. Rep. 129, 91 L. T. N. S. 607.
- Richardson v. Graham, 1 B. R. C. 469**—s. c. [1908] 1 K. B. 39, 77 L. J. K. B. N. S. 27, 98 L. T. N. S. 360.
- Marreco v.**
- South Australian Co. v.**
- Richings, Lavell v.**
- Ricketts v. Thomas Tilling, 6 B. R. C. 683**—s. c. [1915] 1 K. B. 644, 84 L. J. K. B. N. S. 342, 112 L. T. N. S. 137, 31 Times L. R. 17.
- Righton, Hadwell v.**
- Rio Tinto Co., Dynamit Actien-Gesellschaft v.**
- Ertel Bieber & Co. v.**
- Vereingte Koenigs & Laura-Huette Actien-Gesellschaft Fuer Bergbau & Huettenbetrieb v.**
- Robb v. Morrison, 10 B. R. C. 298**—s. c. 20 New S. Wales St. R. 163.
- Robbins, Re, 2 B. R. C. 903**—s. c. [1907] 2 Ch. 8, 76 L. J. Ch. N. S. 531, 96 L. T. N. S. 755.
- v. Legge. See Robbins, Re.**
- Robinson, Booth v.**
- R. v.**
- Robson v. Premier Oil & Pipe Line Co. 7 B. R. C. 814**—s. c. [1915] 2 Ch. 124, 133, [1915] W. N. 168, 205, 113 L. T. N. S. 523, 527, 31 Times L. R. 385, 420, 59 Sol. Jo. 413, 475, 84 L. J. Ch. N. S. 629.
- Roby, Re, 4 B. R. C. 256**—s. c. [1908] 1 Ch. 71, 77 L. J. Ch. N. S. 169, 97 L. T. N. S. 773.
- Rochdale, Hartley v.**
- Roche v. M'Dermott, 1 B. R. C. 949**—s. c. [1901] 1 I. R. 394.

- Roff v. British & F. Chemical Mfg. Co.** 9 B. R. C. 353—s. c. [1918] 2 K. B. 677, 87 L. J. K. B. N. S. 996, 119 L. T. N. S. 436, 34 Times L. R. 485, 62 Sol. Jo. 620.
- Rogers v. General Acci. Fire & Life Assur. Corp.** 9 B. R. C. 229—s. c. 42 Ont. L. Rep. 419.
- v. Mercantile F. Ins. Co.** 42 Ont. L. Rep. 419. See *Rogers v. General Acci. F. & L. Assur. Corp.*
- Ronald v. Harper**, 4 B. R. C. 972—s. c. [1913] Vict. L. R. 311.
- Rondeau, L. G. & Co. v. Marks**, 9 B. R. C. 790—s. c. [1918] 1 K. B. 75, 87 L. J. K. B. N. S. 215, 117 L. T. N. S. 651, 34 Times L. R. 8, 62 Sol. Jo. 24.
- Ross v. Scottish Union & Nat. Ins. Co.** 9 B. R. C. 336—s. c. 68 Can. S. C. 169.
- Rosser & Sons, Devonald v. Roumanian, The**, 5 B. R. C. 937—s. c. [1916] 1 A. C. 124.
- Royal Ins. Co., Hooley Hill Rubber & Chemical Co. v. Rubber Co. v. Martin**, [1902] 1 K. B. 778. See *Harburg Rubber Co. v. Martin*.
- Rubel Bronze & Metal Co. v. Vos**, 9 B. R. C. 567—s. c. [1918] 1 K. B. 315, 87 L. J. K. B. N. S. 466, 34 Times L. R. 171, 118 L. T. N. S. 348.
- Russell, R. v. Rutherford v. Acton-Adams**, 8 B. R. C. 880—s. c. [1915] A. C. 866, 84 L. J. P. C. N. S. 238.
- Sadgrove v. Hole**, 1 B. R. C. 459—s. c. [1901] 2 K. B. 1, 70 L. J. K. B. N. S. 455, 49 Week. Rep. 473, 84 L. T. N. S. 647, 17 Times L. R. 332.
- St. Bartholomew's Hospital, Hillier v. Salaman, Re**, 1 B. R. C. 587—s. c. [1908] 1 Ch. 4, 77 L. J. Ch. N. S. 60, 98 L. T. N. S. 255.
- Salting, Commissioner of Stamp Duties v. Salt Union v. Brunner, M. & Co.** 5 B. R. C. 242—s. c. [1906] 2 K. B. 822, 22 Times L. R. 835, 76 L. J. K. B. N. S. 55, 95 Times L. R. 647.
- Samuel v. Jarrah Timber & W. P. Corp.** 6 B. R. C. 386—s. c. [1904] A. C. 323, 73 L. J. Ch. N. S. 526, 52 Week. Rep. 673, 90 L. T. N. S. 731, 20 Times L. R. 536, 11 Manson, 276.
- Marks v. Samuel & Rosenfeld, Kreglinger v. Samuel Fox & Co., Herbert v. Sandeman, C. & Co., Deverges v. Sarpy v. Holland**, 1 B. R. C. 769—s. c. [1908] 2 Ch. 198, 77 L. J. Ch. N. S. 637, 99 L. T. N. S. 317, 24 Times L. R. 600.
- Sawdon & Co., Turner v.** 10 B. R. C.
- Saxby, Cobb v. v. Fulton**, 4 B. R. C. 381—s. c. [1909] 2 K. B. 208, 78 L. J. K. B. N. S. 781, 101 L. T. N. S. 179, 25 Times L. R. 446, 53 Sol. Jo. 397.
- Scarborough v. Cosgrove**, 3 B. R. C. 305—s. c. [1905] 2 K. B. 805, 74 L. J. K. B. N. S. 892, 54 Week. Rep. 100, 93 L. T. N. S. 530, 21 Times L. R. 754.
- Scarr v. General Acci. Assur. Corp.** 2 B. R. C. 358—s. c. [1905] 1 K. B. 387, 74 L. J. K. B. N. S. 237, 92 L. T. N. S. 128, 21 Times L. R. 173.
- Schaffenius v. Goldberg**, 7 B. R. C. 842—s. c. [1916] 1 K. B. 284, 85 L. J. K. B. N. S. 374, 113 L. T. N. S. 949, 32 Times L. R. 133, 60 Sol. Jo. 105.
- Schlesinger, London & N. Estates Co. v. Scott, Re**, 5 B. R. C. 840—s. c. [1901] 1 Q. B. 228, 70 L. J. Q. B. N. S. 66, 65 J. P. 84, 49 Week. Rep. 178, 83 L. T. N. S. 613, 17 Times L. R. 148.
- v. Coulson**, 5 B. R. C. 792—s. c. [1903] 2 Ch. 249, 72 L. J. Ch. N. S. 600, 19 Times L. R. 440.
- v. Director of Public Prosecutions**, 6 B. R. C. 765—s. c. [1914] 2 K. B. 868, 83 L. J. K. B. N. S. 1025, 111 L. T. N. S. 59, 78 J. P. 267, 30 Times L. R. 396.
- Scottish County Invest. Co., Duncanson v. Scottish Nat. Soc. for Prevention of Cruelty to Children, National Soc. for Prevention of Cruelty to Children v. Scottish Union & Nat. Ins. Co., Ross v. Seery, R. v. Selfridge & Co., Dunlop Pneumatic Tyre Co. v. Sheffield v. Barclay**, 2 B. R. C. 514—s. c. [1905] A. C. 392, 74 L. J. K. B. N. S. 747, 69 J. P. 385, 54 Week. Rep. 49, 93 L. T. N. S. 83, 21 Times L. R. 642, 10 Com. Cas. 287, 12 Manson, 248, 3 L. G. R. 992.
- Sheill, Leslie v. Shelley, Hewson v. Shillito v. Biggart**, 4 B. R. C. 532—s. c. [1903] 1 K. B. 683, 72 L. J. K. B. N. S. 294, 51 Week. Rep. 479, 86 L. T. N. S. 426, 19 Times L. R. 313, 8 Com. Cas. 137, 9 Asp. Mar. L. Cas. 396.
- Shirt v. Calico Printers' Asso.** 3 B. R. C. 62—s. c. [1909] 2 K. B. 51, 78 L. J. K. B. N. S. 528, 100 L. T. N. S. 740, 25 Times L. R. 451, 53 Sol. Jo. 430.
- Sibley v. Grosvenor**, 10 B. R. C. 404—s. c. 21 C. L. R. (Austr.) 469.

- Sidney v. North Eastern R. Co.** 8 B. R. C. 35—s. c. [1914] 3 K. B. 629, 83 L. J. K. B. N. S. 1640, 111 L. T. N. S. 677.
- Sinclair & R. Chamber of Commerce, Goldrei, F. & Son v.**
- Singleton, Brinklow v.**
- Skirrow, Dibden v.**
- Smith v. Giddy,** 2 B. R. C. 897—s. c. [1904] 2 K. B. 448, 73 L. J. K. B. N. S. 894, 91 L. T. N. S. 296, 20 Times L. R. 596, 53 Week. Rep. 207.
- v. Pearson,** [1920] 1 Ch. 247. See *Pearson, Re.*
- v. Prosser,** 5 B. R. C. 682—s. c. [1907] 2 K. B. 735, 97 L. T. N. S. 155, 23 Times L. R. 597.
- Wells v.**
- Smith, Coney & Barrett v. Becker, G. & Co.** 8 B. R. C. 432—s. c. [1916] 2 Ch. 86, 84 L. J. Ch. N. S. 865, 112 L. T. N. S. 914, 31 Times L. R. 151.
- Smith's Falls Public Hospital, Lavere v. Snell, Baker v.**
- Solicitor to the Treasury, Dixon v. Sonnenthal, De Pass v.**
- South Australian Co. v. Richardson,** 9 B. R. C. 52—s. c. 20 C. L. R. (Austr.) 181.
- South Wales Miners' Federation v. Glamorgan Coal Co.** 1 B. R. C. 1—s. c. [1905] A. C. 239, 74 L. J. K. B. N. S. 525, 53 Week. Rep. 593, 92 L. T. N. S. 710, 21 Times L. R. 441.
- Spence v. Ravenscroft,** 7 B. R. C. 284—s. c. 18 C. L. R. (Austr.) 349.
- Stearn v. Prentice Bros.** 9 B. R. C. 535—s. c. [1919] 1 K. B. 394, 88 L. J. K. B. N. S. 422, 17 L. G. R. 142, 35 Times L. R. 207.
- Stephens, Weld-Blundell v.**
- Sterious & Co., Taddy & Co. v.**
- Stevens v. Theatres,** 2 B. R. C. 833—s. c. [1903] 1 Ch. 867, 72 L. J. Ch. N. S. 764, 51 Week. Rep. 585, 88 L. T. N. S. 458, 19 Times L. R. 334.
- Stevenson v. Toronto Bd. of Education,** 9 B. R. C. 796—s. c. 47 Ont. L. Rep. 146.
- Stevenson & Sons v. Aktiengesell-Schaft Für Cartonnagen Industrie.** See *Hugh Stevenson & Sons v. Aktiengesell-Schaft Für Cartonnagen Industrie.*
- Stone, Aplin v.**
- Stuart v. Freeman,** 2 B. R. C. 183—s. c. [1903] 1 K. B. 47, 72 L. J. K. B. N. S. 1, 51 Week. Rep. 211, 87 L. T. N. S. 516, 19 Times L. R. 24.
- Stuart King, Hyams v.**
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- Stucley, Re,** 3 B. R. C. 807—s. c. [1906] 1 Ch. 67, 75 L. J. Ch. N. S. 58, 54 Week. Rep. 256, 93 L. T. N. S. 718, 22 Times L. R. 33.
- v. Kekewich,** [1906] 1 Ch. 67. See *Stucley, Re.*
- Suarez, Re,** 9 B. R. C. 1021—s. c. [1918] 1 Ch. 176, 87 L. J. Ch. N. S. 173, 118 L. T. N. S. 279, 34 Times L. R. 127, 62 Sol. Jo. 158.
- v. Suarez** [1918] 1 Ch. 176. See *Suarez, Re.*
- Sullivan v. Creed,** 2 B. R. C. 139—s. c. [1904] 2 I. R. 317.
- Crowder-Jones v.**
- Swain, Re,** 2 B. R. C. 872—s. c. [1905] 1 Ch. 669, 74 L. J. Ch. N. S. 354, 92 L. T. N. S. 715.
- Sweeney, Janvier v.**
- Sweet, Fraser v.**
- Taddy & Co. v. Sterious & Co.** 3 B. R. C. 286—s. c. [1904] 1 Ch. 354, 73 L. J. Ch. N. S. 191, 52 Week. Rep. 152, 89 L. T. N. S. 628, 20 Times L. R. 102.
- Taff Vale R. Co. v. Amalgamated Soc. of Ry. Servants,** 1 B. R. C. 832—s. c. [1901] A. C. 426, 70 L. J. K. B. N. S. 905, 65 J. P. 596, 50 Week. Rep. 44, 85 L. T. N. S. 147, 17 Times L. R. 698.
- Tankerville, Jones & Sons v.**
- Tate v. Fullbrook,** 2 B. R. C. 93—s. c. [1908] 1 K. B. 821, 77 L. J. K. B. N. S. 577, 98 L. T. N. S. 706, 24 Times L. R. 347, 52 Sol. Jo. 279.
- Taylor, Kish v.**
- Leigh v.**
- Taylor & Co., Millar & Co. v.**
- Telegraph Co. v. Cape Town Tramways Companies,** [1902] A. C. 381. See *Eastern & South African Teleg. Co. v. Cape Town Tramways Cos.*
- Tenby v. Mason,** [1908] 1 Ch. 457. See *Mayor, Aldermen and Burgesses of Tenby v. Mason.*
- Tennants v. Wilson & Co.** 8 B. R. C. 450—s. c. [1917] A. C. 495, 86 L. J. K. B. N. S. 1191, 116 L. T. N. S. 780, 33 Times L. R. 454, 61 Sol. Jo. 575, 23 Com. Cas. 41.
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- Theatres, Stevens v.**
- The Company, Pearson v.**
- The Ella,** 8 B. R. C. 152—s. c. L. R. [1915] Prob. 111, 84 L. J. Prob. N. S. 97, 30 Times L. R. 566.
- The Hypatia,** 7 B. R. C. 828—s. c. L. R. [1917] Prob. 36, 116 L. T. N. S. 25.
- Theodor Schneider & Co. v. Burgett & Newsam.** See *Arnhold Karberg & Co. v. Blythe, G. J. & Co.*

- Thibodeau v. Cheff**, 7 B. R. C. 8—s. c. 24
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- Thomas v. Bradbury, A. & Co.** 6 B. R. C.
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- Thurston & Co., Bailey v.**
- Tibbits, R. v.**
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- Tingley v. Muller**, 8 B. R. C. 681—s. c.
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- Tobakin v. Dublin Southern Dist. Tram-
ways Co.** 3 B. R. C. 926—s. c.
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- Todd, R. v.**
- Toronto Bd. of Education, Stevenson v.**
- Toronto C. v. Consumers' Gas Co.** 9 B. R.
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- Toronto Electric L. Co., Gloster v.**
- Toronto R. Co., Barr v.**
- Brawley v.
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- Torrens v. Walker**, 3 B. R. C. 343—s. c.
[1906] 2 Ch. 166, 75 L. J. Ch. N. S.
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- Town Properties Invest. Corp., Davis v.**
- Tozeland v. West Ham Union**, 6 B. R. C.
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- Transvaal Lands Co. v. New Belgium
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- Treasury Solicitor, Dixon v.** See *Dixon v.
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- Trust Co. v. Hannay & Co.** [1918] 2 K. B.
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- Tunncliffe & Hampson, West Leigh Colliery
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- Turner v. Sawdon & Co.** 2 B. R. C. 751—
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A. C. 260. See *Ertel Bieber & Co.
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- Victoria-Montreal F. Ins. Co., Home Ins. Co.
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- Victorian Stevedoring & General Contract-
ing Co., Pash v.**
- Villar v. Gilbey**, 1 B. R. C. 568—s. c. [1907]
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- Vos, Rubel Bronze & Metal Co. v.**
- Wagstaff, Re**, 4 B. R. C. 50—s. c. [1908]
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- v. Jalland**, [1908] 1 Ch. 162. See *Wag-
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- Wakley, Re**, 10 B. R. C. 674—s. c. [1920]
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- Walker, Re**, 4 B. R. C. 432—s. c. [1905]
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- Harrison v.
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- Wallace v. Bergius**, 7 B. R. C. 692—s. c.
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- Kingsbury v.**

- Walter v. Lane, 2 B. R. C. 312**—s. c. [1900] A. C. 539, 69 L. J. Ch. N. S. 699, 49 Week. Rep. 95, 83 L. T. N. S. 289, 16 Times L. R. 551.
- Walters v. W. H. Smith & Son, 7 B. R. C. 666**—s. c. [1914] 1 K. B. 595, 83 L. J. K. B. N. S. 335, 110 L. T. N. S. 345, 78 J. P. 118, 30 Times L. R. 158, 58 Sol. Jo. 186.
- Warburton v. Cooper, 46 Ont. L. Rep. 565.** See *Godfrey v. Cooper*.
- Ward, Jackson v.**
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- Warnes & Co., Commissioners of Inland Revenue v.**
- Warwick Deeping, Ex parte, [1907] 2 K. B. 33.** See *Grant Richards, Re*.
- Watson v. Jones, [1905] A. C. 480.** See *Watson v. M'Ewan*.
- v. M'Ewan, 4 B. R. C. 934**—s. c. [1905] A. C. 480, 74 L. J. P. C. N. S. 151, 93 L. T. N. S. 489.
- Watson & Sons, Jackson v.**
- Watt v. Watt, 6 B. R. C. 1**—s. c. [1905] A. C. 115, 74 L. J. K. B. N. S. 438, 69 J. P. 249, 53 Week. Rep. 547, 92 L. T. N. S. 480, 21 Times L. R. 386.
- Weardale Steel, Coal & Coke Co., Herd v.**
- Webb, Bevan v.**
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- Weber, Ex parte, 7 B. R. C. 880**—s. c. [1916] 1 A. C. 421, 85 L. J. K. B. N. S. 944, 114 L. T. N. S. 214, 80 J. P. 249, 32 Times L. R. 312, 60 Sol. Jo. 306.
- Wedgewood, Re, 8 B. R. C. 826**—s. c. [1915] 1 Ch. 113, [1914] W. N. 399, 84 L. J. Ch. N. S. 107, 112 L. T. N. S. 66, 31 Times L. R. 43, 59 Sol. Jo. 73.
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- Wedmore, Re, 2 B. R. C. 502**—s. c. [1907] 2 Ch. 277, 76 L. J. Ch. N. S. 486, 97 L. T. N. S. 26, 23 Times L. R. 547.
- v. Wedmore.** See *Wedmore, Re*.
- Weld-Blundell v. Stephens, 9 B. R. C. 368**—s. c. [1919] 1 K. B. 520, 88 L. J. K. B. N. S. 680, 120 L. T. N. S. 494, [1919] W. N. 46, 35 Times L. R. 245, 63 Sol. Jo. 301.
- Wells v. Smith, 6 B. R. C. 947**—s. c. [1914] 3 K. B. 722, 83 L. J. K. B. N. S. 1614, 30 Times L. R. 623.
- Welsh, Glasgow Coal Co. v.**
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- Wertheim v. Chicoutimi Pulp Co. 7 B. R. C. 315**—s. c. [1911] A. C. 301, 80 L. J. P. C. N. S. 91, 104 L. T. N. S. 226, 16 Com. Cas. 297, 48 Scot. L. R. 1090.
- West v. Bristol Tramways Co. 4 B. R. C. 243**—s. c. [1908] 2 K. B. 14, 77 L. J. K. B. N. S. 684, 72 J. P. 243, 99 L. T. N. S. 244, 24 Times L. R. 478, 52 Sol. Jo. 393, 6 L. G. R. 609.
- Western Morning News Co., McQuire v.**
- West Ham Union, Toxeland v.**
- West Leigh Colliery Co. v. Tunncliffe & Hampson, 5 B. R. C. 916**—s. c. [1908] App. Cas. 27, 77 L. J. Ch. N. S. 102, 98 L. T. N. S. 4, 24 Times L. R. 146.
- Westminster, Chaplin & Co. v.**
- Westmorland, Morel Bros. & Co. v.**
- West Rand Cent. Gold Min. Co. v. R. 5 B. R. C. 885**—s. c. [1905] 2 K. B. 301, 74 L. J. K. B. N. S. 753, 53 Week. Rep. 660, 93 L. T. N. S. 207, 21 Times L. R. 562.
- W. H. Chaplin & Co. v. Westminster, [1901] 2 Ch. 329.** See *Chaplin & Co. v. Westminster*.
- Wheeler, Herdman v.**
- Whight, Boosey v.**
- White v. White, 3 B. R. C. 552**—s. c. [1906] A. C. 72, 85 L. J. P. C. N. S. 14, 94 L. T. N. S. 64.
- Whiteley v. Hilt, 9 B. R. C. 897**—s. c. [1918] 2 K. B. 808, 87 L. J. K. B. N. S. 1058, 34 Times L. R. 592, 62 Sol. Jo. 717, 145 L. T. Jo. 275.
- Whitford v. Corkum.** See *Conrad v. Corkum*.
- Whiting v. De Rutzen, [1905] 1 Ch. 96.** See *Whiting's Settlement, Re*.
- Whittings' Settlement, Re, 4 B. R. C. 10**—s. c. [1905] 1 Ch. 96, 21 Times L. R. 83.
- W. H. Smith & Son, Walters v.**
- Widgeon, Heath v.**
- Williams, Re, 8 B. R. C. 359**—s. c. [1914] 2 Ch. 61, 83 L. J. Ch. N. S. 570, 110 L. T. N. S. 923, 58 Sol. Jo. 470.
- Krygger v.**
- v. Lewis, 8 B. R. C. 339**—s. c. [1915] 3 K. B. 493, 32 Times L. R. 42.
- Metcalf v.**
- v. Moss's Empires, 8 B. R. C. 636**—s. c. [1915] 3 K. B. 242, 84 L. J. K. B. N. S. 1767, 113 L. T. N. S. 560, 31 Times L. R. 463.
- v. Thomas, 3 B. R. C. 929**—s. c. [1909] 1 Ch. 713, 78 L. J. Ch. N. S. 473, 100 L. T. N. S. 630.

- Williams Bros. v. Agius**, 7 B. R. C. 332—
s. c. [1914] A. C. 510, 83 L. J. K.
B. N. S. 715, 110 L. T. N. S. 865,
30 Times L. R. 351, 58 Sol. Jo.
377, 19 Com. Cas. 200.
- Willis, R. v.**
v. Young, 3 B. R. C. 976—s. c. [1907]
1 K. B. 448, 76 L. J. K. B. N. S.
390, 71 J. P. 6, 96 L. T. N. S. 155,
23 Times L. R. 23.
- Wilmer's Trusts, Re**, 4 B. R. C. 479—s. c.
[1903] 2 Ch. 411, 72 L. J. Ch. N. S.
670, 89 L. T. N. S. 148.
- Wilson v. Carnley**, 1 B. R. C. 901—s. c.
[1908] 1 K. B. 729, 77 L. J. K. B.
N. S. 594, 98 L. T. N. S. 265, 24
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- Wilson & Co., Tennants v.**
- Wing v. London General Omnibus Co.** 3 B. R.
C. 79—s. c. [1909] 2 K. B. 652,
78 L. J. K. B. N. S. 1063, 101 L. T.
N. S. 411, 73 J. P. 429, 25 Times
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R. 1093.
- Wingfield, Moore v.**
- Wingrove, Garner v.**
- Winkfield, The**, 3 B. R. C. 368—s. c. [1902]
P. 42, 71 L. J. Prob. N. S. 21,
50 Week. Rep. 246, 85 L. T. N. S.
688, 18 Times L. R. 178, 9 Asp.
Mar. L. Cas. 259.
- Winnipeg Electric R. Co. v. Canadian N. R.**
Co. 10 B. R. C. 454—s. c. 59 Can.
S. C. 352.
- Hill v.**
- Wise v. Perpetual Trustee Co.** 5 B. R. C.
752—s. c. [1903] A. C. 139, 72 L.
J. P. C. N. S. 31, 51 Week. Rep.
241, 87 L. T. N. S. 569, 19 Times
L. R. 125.
- 10 B. R. C.**
- Wolverhampton v. Emmons**, [1901] 1 Q. B.
515. See Mayor, Aldermen, and
Burgesses of Wolverhampton v.
Emmons.
- Wolverhampton, W. & D. Cinemas, Fenning
Film Service v.**
- Woodhead, Goodhart v.**
- Woolston, The.** See Odesso, The.
- Worthington Corp. v. Heather**, 4 B. R. C.
280—s. c. [1906] 2 Ch. 532, 75 L. J.
Ch. N. S. 761, 22 Times L. R. 750,
4 L. G. R. 1179, 95 L. T. N. S.
718.
- Wright v. Anderton**, 4 B. R. C. 425—s. c.
[1909] 1 K. B. 209, 78 L. J. K. B. N.
S. 165, 100 L. T. N. S. 123, 25
Times L. R. 156, 53 Sol. Jo. 135.
- Midland R. Co. v.**
Percival v.
- Wrigley v. Gill**, 4 B. R. C. 814—s. c. [1906]
1 Ch. 165, 75 L. J. Ch. N. S. 210,
54 Week. Rep. 274, 94 L. T. N. S.
174.
- Yangtze Ins. Asso. v. Indemnity Mut. M.**
Assur. Co. 5 B. R. C. 53—s. c.
[1908] 2 K. B. 504, 77 L. J. K. B.
N. S. 995, 99 L. T. N. S. 498, 24
Times L. R. 687, 52 Sol. Jo. 550,
13 Com. Cas. 283.
- Yates v. Terry**, 5 B. R. C. 446—s. c. [1902]
1 K. B. 527, 71 L. J. K. B. N. S.
282, 50 Week. Rep. 293, 86 L. T.
N. S. 133, 18 Times L. R. 262.
- Yeo, Finkbeiner v.**
- Yorkshire Miners' Asso., Denaby & C. Main
Collieries v.**
- Young, Willis v.**

British Ruling Cases



[ENGLISH COURT OF APPEAL.]

FLETCHER & SON *v.* JUBB, BOOTH, & HELLIWELL.

[1920] 1 K. B. 275.

Also Reported in 122 Times L. R. 258, 89 L. J. K. B. N. S. 236.

Appeal and error — Rule of decision — Presumption in favor of correctness of decision in court below.

An appellate court should not disturb the judgment of the court below unless satisfied that it is wrong.

Attorney and client — Negligence — Instructions to make claim — Allowing claim to become barred.

An attorney instructed by a client to make a claim against a municipal corporation for a neglect or default in the execution of a public duty, an action on which will be barred by statute unless brought within six months, is negligent in omitting to warn his client, while an offer of settlement is under consideration, of the necessity of prompt action, in consequence of which the claim is barred.

Judgment of A. T. Lawrence, J., reversed.

(October 20, 1919.)

APPEAL from the judgment of A. T. Lawrence, J.

The action was brought by the plaintiffs, a firm of carriers, against the defendants to recover damages for negligence in the conduct of an action brought by the plaintiffs against the Brad-

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ford Corporation in which the defendants acted as the plaintiffs' solicitors.

[276] On September 11, 1916, a collision occurred on the Huddersfield Road near Bradford between a tramcar of the Bradford Corporation and a wagon of the plaintiffs containing certain goods the property of the Wheatley Chemical Company. The collision occurred through the negligence of the driver of the tramcar in the service of the corporation. The wagon, horse, and driver of the plaintiffs were injured, and so were the goods of the Wheatley Chemical Company.

On September 12 the defendants wrote to the corporation: "We have been consulted by Messrs. C. Fletcher & Son of this town (Halifax), carriers, respecting the damage done to their driver, horse, wagon, and contents by the negligence of the driver of tramcar No. 212 from Wyke to Bradford yesterday afternoon. It is impossible to estimate the damage, but particulars will be forwarded in due course." On September 19 the defendants wrote: "We have since received instructions on behalf of the Wheatley Chemical Company . . . to apply to you for 10*l.* 17*s.* 3*d.* . . . being the damage sustained by them in the accident which occurred . . . on the 11th inst. owing to the negligence of the driver of tramcar No. 212. . . ." On September 28 the town clerk of Bradford wrote to the defendants that the corporation were prepared to compensate the chemical company for the loss sustained by them in the accident, and that the only question was as to the amount of damage sustained. On September 28 the defendants wrote to the town clerk asking if the corporation were prepared to do anything with regard to the plaintiffs' claim, and saying that they had instructions to commence proceedings unless some satisfactory settlement was come to. On October 9 the town clerk offered 10*l.* in settlement of the Wheatley Chemical Company's claim, and on October 20 that sum, together with 2*l.* 2*s.* for the defendants' costs, was paid by the corporation and accepted by the company in settlement.

In the meantime several letters passed between the defendants and the corporation with reference to the plaintiffs' claim, and on November 20 the town clerk wrote offering to pay 20*l.* in settlement of this claim. On November 21 the defendants wrote to

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the plaintiffs: "We inclose copy letter [277] which we have to-day received from the town clerk of Bradford, and await your instructions." The plaintiffs never answered this letter.

On March 10, 1917, the defendants wrote to the plaintiffs: "Yourselves *v.* Bradford Corporation. Please let us know if you have settled your claim against the above corporation and if so, upon what terms." The plaintiffs did not answer this letter.

On April 12, 1917, the defendants wrote to the town clerk: "Fletcher & Son *v.* The Corporation. Owing to the upset caused by the war this matter has been neglected, but our client now wishes to have it settled and instructs us to claim 75*l.* for the damage he has incurred to his horse, loss of profit, damage, and loss of gear, etc." The town clerk replied on April 16: "I have submitted your letter of the 12th inst. to my claims subcommittee to-day, and they express surprise at the amount which your clients now claim, *viz.*, 75*l.* You will remember that I wrote to you on November 20 last offering 20*l.* in settlement of the claim, and the subcommittee consider that the offer was a fair one in the circumstances. If you will let me have details showing how the sum of 75*l.* is made up, I will submit the same to the subcommittee at their next meeting, though I am not in a position to state whether the subcommittee are disposed to do anything further in the matter." The defendants sent particulars of the claim amounting to 71*l.* 9*s.* 9*d.* After further correspondence, on June 11, 1917, the town clerk wrote to the defendants: "I have submitted your letter of the 8th inst. to the tramways claims subcommittee to-day, and am instructed to inform you that they are not disposed to pay more than 20*l.* in settlement of your clients' claim, this sum being the amount offered in my letter of November 20 last. If the offer in question is not accepted before Saturday of this week it will be withdrawn."

On July 21, 1917, the defendants entered a plaint in the Bradford County Court on behalf of the plaintiffs, claiming a sum which was subsequently agreed at 48*l.* 14*s.* 9*d.* against the Bradford Corporation. The corporation gave notice of a special defense that the claim for which they were summoned [278] was barred by a statute of limitations, namely, the Public Authorities Protection Act 1893. The action was heard in the Bradford County Court. The county court judge held that the plaintiffs' 10 B. R. C.

claim was barred by the statute and gave judgment for the corporation.

The plaintiffs then brought this action against the defendants alleging negligence on their part in not taking proceedings against the Bradford Corporation until July 21, by which time the plaintiffs' claim against the corporation was barred.

The case was heard at the Leeds Assizes in May, 1919, by A. T. Lawrence, J., without a jury. The learned judge held that the defendants had not been guilty of negligence, having been misled into thinking that the Bradford Corporation had admitted liability in the plaintiffs' case as they had in the case of the Wheatley Chemical Company. He therefore gave judgment for the defendants.

The plaintiffs appealed.

Waugh, K.C., and Harold Newell, for the appellants.

Mitchell-Innes, K.C., and Whately, for the respondents.

The arguments of counsel sufficiently appear in the judgments.

Bankes, L.J.: This is an appeal from A. T. Lawrence, J., in an action tried before the learned judge without a jury. Mr. Mitchell-Innes rightly contends that we ought not to disturb the judgment unless we are sure it is wrong. Now I differ with much reluctance from the opinion of so experienced a judge, but I am satisfied that he took too charitable a view of the solicitors' conduct in this case. The appellants were the owners of a horse and cart which were injured by a collision with a tramcar of the Bradford Corporation on September 11, 1916. The appellants alleged that their horse and cart were damaged by the negligence of the corporation's servant, and that they had a claim for damages against the corporation. This claim would be barred unless an action were brought on or before March 10, 1917. On September 12, 1916, the appellants went to the respondents and instructed them as their solicitors [279] to negotiate with the corporation and endeavor to come to a settlement, and, failing that, to commence proceedings. The appellants' cart contained goods belonging to a chemical company for damage to which the com-

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pany made a claim. The appellants' driver also made a claim for personal injuries. The corporation took up the position that they could not dispute the negligence of their servant; but they did dispute the amount of the damage; and so there was every possibility and probability that the dispute would end in litigation.

Now solicitors are under an obligation to bring to the discharge of their duty as solicitors reasonable care and skill and knowledge of the practice of the court whose process they invoke on behalf of a client. A solicitor, as was said by Tindal, Ch.J., in *Godefroy v. Dalton* (1830) 6 Bing. 460, 468, 24 Eng. Reprint, 656, 4 Moore & P. 149, 8 L. J. C. P. N. S. 79, 31 Revised Rep. 467, "is liable for the consequences of ignorance or nonobservance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses: and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law." The respondents were certainly under an obligation to know the provisions of the Public Authorities Protection Act 1893, § 1, and to bear them in mind at every material stage of the proceedings. On November 20 the corporation made an offer of 20l. The respondents passed this offer on to their clients, saying at the same time that they awaited their instructions. The respondents certainly did not think the corporation were going to admit the whole claim, or that the offer was one to be accepted as a matter of course. They expected instructions from the appellants. They heard nothing until after the time had expired within which an action could be brought. What was the respondents' duty? Being bound to keep in mind the provisions of the statute, and believing as they did that they were still acting as the appellants' solicitors, they were under a [280] duty to intimate to their clients that they must make up their minds to act on or before March 10 if they desired to assert their rights in a court of law. The respondents did nothing. Their excuse for this inactivity is founded, first, on the attitude of the corporation, and, secondly,

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on the attitude of the appellants. As to the corporation, it cannot be said that they were intimating more than that they were not likely to dispute liability for the accident; there was nothing to suggest that they were not going to dispute the amount to which the appellants might be entitled. But unless the conduct of the corporation was such as to preclude question on both these points, it was possible that the appellants would be obliged to bring an action. Therefore I cannot agree with A. T. Lawrence, J., in his view that the respondents' representative was so misled that it would be unfair to find that he was negligent. I cannot see anything in the conduct of the corporation justifying the respondents in omitting to warn their clients that unless they brought their action on or before March 10 it would be barred.

Then as to the conduct of the appellants themselves. It is true that they were remiss in not answering the respondents' letter of November 21 asking for instructions. But it is also clear that the respondents did not on this account consider that they had discharged their whole duty to their clients in relation to the claim against the corporation, because on March 10, 1917, they wrote to the appellants as their solicitors on this very matter. In my opinion they cannot rely on their clients' conduct as justifying them in doing nothing until it was too late. The appeal must be allowed, and judgment must be entered for the appellants for 48l. 14s. 9d.

Scrutton, L.J.: I share to the full the reluctance of Bankes, L.J., in differing from the judgment of A. T. Lawrence, J. I also admit the presumption that the judgment is right, and that we should not differ from it unless we are clearly satisfied that it was wrong. And moreover I accept the opinion of Tindal, Ch.J., in *Godefroy v. Dalton* (1830) 6 Bing. 460, 24 Eng. Reprint, 656, 4 Moore & P. 149, 8 L. J. C. P. N. S. 79, 31 Revised Rep. 467, that it would be extremely difficult to define the [281] exact limit by which the skill and diligence which a solicitor undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia*, or *lata culpa* mentioned in some of the cases, for
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which he is undoubtedly responsible. It is a question of degree and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed. In cases within that region of doubt this court would not overrule the judgment of the court below. But this is not one of those cases.

Now it is not the duty of a solicitor to know the contents of every statute of the realm. But there are some statutes which it is his duty to know; and in these days when the defendants in so many actions are public authorities the Public Authorities Protection Act 1893 is one of those statutes. The appellants instructed the respondents to make a claim and, if necessary, to bring an action against the Bradford Corporation for damage done by one of the tramcars of the corporation. The respondents wrote and for some time continued writing to the corporation. It is well known that public authorities are willing to avoid litigation if they can settle claims upon reasonable terms, and equally well known that they do not admit claims which they regard as unreasonable; and in the correspondence which took place between the corporation and the respondents I cannot find any admission of liability to the claim the appellants were making. What is the duty of a solicitor who is retained to institute an action which will be barred by statute if not commenced in six months? His first duty is to be aware of the statute. His next is to inform his client of the position. The corporation made an offer to settle this claim; the solicitors sent on the offer to their clients, and they made no answer. The time of limitation was running out. The clients did not know this and they were not warned by the solicitors. One would expect that as the time drew near the solicitors would tell them that if they did not bring an action their claim would be barred. Instead of that they wrote on March 10, the day on [282] which the time expired, to ask if the claim had been settled and if so upon what terms. I cannot understand how they came to write that letter except on the footing that they were still the legal advisers of the appellants. It is urged on their behalf that they were by the conduct of the corporation misled into thinking that the claim had been settled; but I cannot accept that suggestion; they knew that the corporation were investigating the amount of the claim. The period of limitation

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was one of those matters which the respondents as the appellants' legal advisers ought to have borne in mind. It was negligence not to bear it in mind. For these reasons I agree that the appeal should be allowed.

Duke, L.J.: I feel the same reluctance as my brethren in differing from the learned judge, but as I have a clear view I am bound to express it. The respondents, being retained to settle or prosecute a claim, were bound to exercise reasonable care and diligence in protecting the interests of their clients. The Bradford Corporation were making inquiries and were probably ready to meet any reasonable claim. They made an offer of 20*l.* which the respondents communicated to their clients, who, however, made no reply. Four months elapsed. Then on March 10, the day on which the time for taking proceedings expired, they wrote recognizing that they were still the appellants' solicitors. Had they discharged their obligation to the appellants? It is said that they were misled by the conduct of the corporation; that they were satisfied that the corporation would pay. If they had reasonable ground for supposing that their client was safeguarded, the words of Lord Cottenham, *Ld. Ch.*, in *Hart v. Frame* (1839) 6 *Clark & F.* 193, 210, 7 *Eng. Reprint*, 670, *Macl. & R.* 595, 9 *Eng. Reprint*, 218, 3 *Jur.* 547, might have been invoked in their favor: "Professional men, possessed of a reasonable portion of information and skill, according to the duties they undertake to perform, and exercising what they so possess with reasonable care and diligence in the affairs of their employers, certainly ought not to be held liable for errors in judgment, whether in matters of law or discretion." That means matters of law which are usually [283] left to the other branch of the legal profession. Here there was no ground for supposing that the position of the appellants was safeguarded. It was left to rest on the corporation's sense of propriety. That was a position to which no client ought to be brought without his own consent. The duty of the solicitors was not discharged when they communicated to their clients the offer of the corporation and got no reply. It was their duty to know the provisions of the Public Authorities Protection Act 1893, § 1, and to apply their knowledge; to lose sight of the statute was to
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fail in that degree of care and skill to which the client is entitled. If they had written warning the appellants that the period of limitation was running out and that if they were meditating legal proceedings they should give instructions at once, that might have satisfied their obligation to their clients; but as it was the solicitors lost sight and the clients were allowed to lose sight of the provisions of the statute. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Van Sandau & Company, for C. H. Marshall, Huddersfield.*

Solicitors for respondents: *Helliwell, Harby, & Evershed, for W. H. Boocock & Son, Halifax.*

Note.—Liability of attorney for allowing claim to become barred by limitations.

It is a general rule that an attorney is required to exercise reasonable care and diligence with respect to business intrusted to him by his clients, and that he is liable for a failure to use ordinary care, skill, and diligence, by reason of which the client's right of action becomes barred by the Statute of Limitations. *Stevens v. Walker* (1870) 55 Ill. 151; *King v. Fourchy* (1895) 47 La. Ann. 354, 16 So. 814; *Drury v. Butler* (1898) 171 Mass. 171, 50 N. E. 527; *Parker-Smith v. Prince Mfg. Co.* (1916) 172 App. Div. 302, 158 N. Y. Supp. 346; *Fox v. Jones* (1889) 4 Tex. App. Civ. Cas. (Willson) 48, 14 S. W. 1007; *FLETCHER & SON v. JUBB, BOOTH, & HELLIWELL* (reported herewith) *ante*, 1.

It will be observed that in the reported case (*FLETCHER & SON v. JUBB, BOOTH, & HELLIWELL*) an attorney was held liable to his client where the latter placed a claim for damages in the former's hands, with instructions to attempt to make a settlement, otherwise to commence suit, and the attorney lost sight of the statute regulating limitations, and allowed the claim to become barred without notifying his client.

And in *For v. Jones* (1889) 4 Tex. App. Civ. Cas. (Willson) 48, 14 S. W. 1007, it was held that a good cause of action was stated, where the plaintiff alleged that he employed the defendant, an attorney, to collect a valid and subsisting obligation; that he instructed the defendant to bring suit upon the note forthwith; that the obligors were then solvent, but that the defendant neglected to bring suit or collect the note, which had long since become barred by limitations, and that the obligors had become insolvent.

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And in *Stevens v. Walker, supra*, where a claim, founded on a judgment, was placed in an attorney's hands for collection against the deceased debtor's estate eighteen months prior to the expiration of the two years allowed by statute to settle the estate, and the attorney failed to procure the allowance of the claim, which was struck from the docket for want of prosecution, and for failure of the claimant, who was a nonresident, to give bond, and the estate was entirely consumed in paying the claims allowed, it was held that the attorney was liable for failing to have procured the allowance of the claim before the expiration of the statutory period for settling the estate, so that it could have participated in the assets.

And in *King v. Fourchy* (1895) 47 La. Ann. 354, 16 So. 814, where an attorney was employed to institute a suit for slander, and a sum was deposited with him for costs, and the attorney filed a petition, but neglected to prosecute the suit, and it became barred by limitations, it was held that he was liable to his client for the probable amount that would have been recovered in the slander action, it appearing that a good cause of action existed and that the defendant in the slander suit had sufficient property to satisfy a judgment recovered.

And in *Drury v. Butler* (1898) 171 Mass. 171, 50 N. E. 527, it was held that an attorney was liable for the damage sustained by one who had employed him to bring suit against a town to recover damages resulting from laying a sewer through the client's property, where the attorney neglected, until after the expiration of the two years allowed for recovery of damage caused by the taking of land, to take action, by reason of which the claim was barred.

In *Parker-Smith v. Prince Mfg. Co.* (1916) 172 App. Div. 302, 158 N. Y. Supp. 346, where, in an action by an attorney for fees, the defendant interposed the defense of negligence on the part of the attorney in wrongly advising as to the applicability of the statute of Limitations, by reason of which some of the client's claims were barred, it was held error to refuse to submit the question of negligence to the jury, there being evidence for the defendant that the attorney at first neglected to consider the feature of the Statute of Limitations, and that he permitted negotiations to continue until some of the claims were barred.

In *McAdoo v. Lummis* (1875) 43 Tex. 227, where an attorney held a note without fee or charge, not for the purpose of suit, but merely of receiving and forwarding the payments as the mutual friend of the parties, and to save commissions, it was held that he could not be held liable for the debt upon its becoming barred by limitations, since under such circumstances no exercise of professional skill was required.

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[ENGLISH DIVISIONAL COURT.]

PIERCY v. S. MILLS & COMPANY, LIMITED.

[1920] 1 Ch. 77.

Also Reported in 88 L. J. Ch. N. S. 509, 122 L. T. N. S. 20, [1919] W. N. 254,
35 Times L. R. 703.***Corporation — Issue of shares — Fiduciary power of directors — Shares issued by directors to themselves to retain control of company — Breach of trust — Invalidity.***

A power to issue shares in a limited company given to directors for the purpose of enabling them to raise capital when required for the purpose of the company is a fiduciary power to be exercised by them bona fide for the general advantage of the company, and when the company is in no need of further capital, directors are not entitled to use their power of issuing shares merely for the purpose of maintaining their control, or the control of themselves and their friends, over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders.

The principle of *Fraser v. Whalley* (1864) 2 Hem. & M. 10, 71 Eng. Reprint, 361, 11 L. T. N. S. 175, and *Punt v. Symons & Co.* [1903] 2 Ch. 506, 72 L. J. Ch. N. S. 768, 52 Week. Rep. 41, 10 Manson, 415, applied.

(July 22, 1919.)

WITNESS ACTION.

The following statement of facts and of the result of the evidence is taken from his Lordship's judgment:

"This is an action in which the plaintiff claims a declaration that the allotments of 150 preference shares in the defendant company to Mr. Shercliff, one of the defendants, 100 preference shares in the company to the defendant Mr. King, 150 preference shares to the defendant Mr. Skellett, and 200 preference shares to the defendant Mr. Wainwright, were made in breach of the fiduciary powers of the directors of the defendant [78] company and were void, and that the allotments ought to be canceled.

"This was a company which, when the events which gave rise to this action took place, had a capital of some 4,252 issued shares of 1l. each, some ordinary and some preference. The two directors were Mr. Shercliff and Mr. King. The plaintiff had been appointed a temporary manager at a remuneration. Some
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difficulties arose between him and the directors, Mr. King and Mr. Shercliff, who did not consider him suitable for the position. But the matter was complicated by the fact that the plaintiff had acquired a majority of the shares; out of the 4,252 issued shares he had become the holder of, or was entitled to, 2,146, and desired to become one of the directors. It may be, and for this purpose I will assume, that the directors were right in considering that he was not altogether a fit person to be a director of this company, but, having the largest interest in the company, it was not unnatural that he should desire to be on the board of directors.

"On September 17, therefore, he intimated to the directors that he wished to be a director. The two existing directors considered the question, and came to the conclusion that it was undesirable that he should be appointed a director. On September 30 the plaintiff, having no doubt been irritated by the refusal of the existing directors to exercise their powers of electing him to be a member of the board, sent this notice to the directors: 'I, the undersigned member of the company, give you notice that it is my intention at the next general meeting of the company at which it shall be competent to nominate directors, to nominate the following for election.' Then he nominated his two brothers and himself. The result of this move would have been that at the next general meeting, having the majority of the shares, he would have elected a majority of the board of directors. On October 1 he sent a notice to the directors requiring them to call a meeting of the company for the purpose of considering resolutions which he proposed to put forward. The plaintiff gave an account of the manner in which he and his brother went to the public library and consulted law books, with the result that, ultimately, [79] they produced this series of proposed resolutions. The first resolution was, 'That the existing directors be removed,' and the second was, 'That the company be wound up voluntarily.' It is manifest that he could not, if he had realized the effect of them, have put the two resolutions as anything but alternatives. In any case it is quite clear that he had not a majority to carry either of these resolutions. Then the other series contains a number of resolutions which in the main are not inconsistent with the proposal of the plaintiff in the notice of September 30 to elect further directors.

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"I think it fairly clear that what the plaintiff was aiming at was, first, to get on to the board himself, and when the directors refused to appoint him, to have the number of directors raised to the maximum number permitted under the articles, the vacancies being filled up with his nominees.

"On October 17 the directors dismissed the plaintiff from the position of manager. On October 18 Mr. Shercliff wrote to Mr. King: 'Many thanks for your letter of the 17th instant. The issue of sufficient shares to retain full control seems to be the best way out of the mix-up.' On October 23 the two directors met, and, amongst other things, they resolved 'that preference shares be hereby allotted to the following persons,' namely, to Mr. Neal, 100 shares—he is not a party to the action, and therefore the question of the allotment of shares to him is not under consideration in the present proceedings—Mr. King 100 shares, and to Mr. Shercliff 150 shares.

"I have heard Mr. King and Mr. Shercliff on the subject of the issue of these shares, and they were, especially Mr. Shercliff, perfectly frank on the subject. It is manifest from the letter of October 18, and from the evidence of the two witnesses, that the shares were allotted simply and solely for the purpose of retaining control in the hands of the existing directors. It was about this time that Mr. Skellett and Mr. Wainwright, who were connected with Mr. Shercliff in the business that he carried on, were appointed codirectors by Mr. King and Mr. Shercliff, and their director's qualification was provided by transfers of shares from Mr. Shercliff. By the manœuver of the allotment of the shares, which took place on October 23, [80] the directors and their friends had obtained a small majority over the plaintiff and his friends, and the result was that the resolutions which were proposed by the plaintiff were defeated. The plaintiff, however, had been in negotiation for the acquisition of other shares in the company, and, having obtained a further block of shares, small in number, but sufficient to give him a new majority, he then proceeded to requisition the directors to call another meeting, and, on November 18, he deposited a transfer of the shares which he had acquired with the company for registration. The directors apparently considered that this move required immediate atten-

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tion, and on November 14 Mr. Shercliff and Mr. King met and proceeded to allot to their two new codirectors, Mr. Wainwright and Mr. Skellett, further shares, with the result that they and their friends had a majority over the plaintiff once more. In this case, also, it is manifest from the evidence that these shares were allotted solely for the purpose of keeping the control and maintaining the majority over the plaintiff, and it is also quite clear that all the four directors fully realized that that was the sole object. As soon as this fresh allotment came to the knowledge of the plaintiff he very wisely withdrew his requisition, and brought this action for the purpose of determining the question whether acts of this character on the part of the directors were or were not legitimate."

The defendant company had been incorporated in 1903, with an authorized capital of 10,000*l.* divided into 5,000 preference shares of 1*l.* each and 5,000 ordinary shares of 1*l.* each. The articles of association provided (*inter alia*) that every member present in person should have one vote for every share held by him; that the number of directors should not be less than two nor more than five; that, until otherwise determined, two directors should form a quorum at meetings of the directors; and that the directors should have power from time to time and at any time to appoint any other persons to be directors.

Article 80 provided as follows: "No director shall be disqualified by his office from contracting with the company either as vendor, purchaser, or otherwise, nor shall any such [81] contract or arrangement, or any contract or arrangement entered into by or on behalf of the company in which any director shall be in any way interested be avoided, nor shall any director so contracting or being so interested be liable to account to the company for any profit realized by any such contract or arrangement by reason of such director holding that office or of the fiduciary relations thereby established."

The evidence showed that at the time of the issue of the shares in dispute in this action the company was not in any need of any further capital.

Tomlin, K.C., and H. E. Wright, for the plaintiff. The com-
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pany was in no financial need of this further issue, and the issue and allotment of these shares were made by the directors simply for the purpose of retaining the controlling power. Directors cannot lawfully use powers vested in them in a fiduciary character for such a purpose. *Fraser v. Whalley* (1864) 2 Hem. & M. 10, 71 Eng. Reprint, 361, 11 L. T. N. S. 175; *Punt v. Symons & Co.* [1903] 2 Ch. 506, 72 L. J. Ch. N. S. 768, 52 Week. Rep. 41, 10 Manson, 415. Their duty and their interest were in conflict, and in making these allotments they were utilizing their power for their own ends.

Further, "no director can, in the absence of a stipulation to the contrary, partake in any benefit from a contract which requires the sanction of a board of which he is a member." Buckley on the Companies Act, 9th ed pp. 639, 640. An article allowing him to contract with the company does not enable him as director to say whether there shall be any such contract; the other directors have to do that. Apart from a special clause to that effect, it is not open to him as director to vote on the question of a contract with himself.

[Peterson, J., referred to *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899] 2 Ch. 392, 68 L. J. Ch. N. S. 699, 48 Week. Rep. 74, 81 L. T. N. S. 334, 15 Times L. R. 436.]

Article 80 is intended to relate only to a director contracting with the company. The question of an allotment of shares amounting to a contract or arrangement with the company was raised in *Quinn v. Robb* (1916) 141 L. T. Jo. 6, and *Neal v. Quinn* [1916] W. N. 223, 141 L. T. Jo. 90, but there is nothing in this article to justify a director giving advice to [82] the company which results in the company entering into an agreement with the director by means of his vote.

Hughes, K.C., and Ashton Cross, for the defendant directors. The question really is whether when an attempt is made by one or two shareholders to get control of the shares for the purpose of wrecking the company the directors are entitled to allot shares for the purpose of saving the company. *Fraser v. Whalley* (1864) 2 Hem. & M. 10, 71 Eng. Reprint, 361, 11 L. T. N. S. 175, was a very special case, and the power was given to the directors for a particular purpose, for which it was not being used, 10 B. R. C.

and that was the ground upon which the interlocutory order in that case was made, and in *Punt v. Symons & Co.* [1903] 2 Ch. 506, 72 L. J. Ch. N. S. 768, 52 Week. Rep. 41, 10 Manson, 415, which was also interlocutory, the injunction was confined to restraining the holding of the confirmatory meeting in contemplation of which the shares had been issued. The defendants Wainwright and Skellett were not present at the meeting when the allotment was made to them, and they were not cognizant of the motive. There is no evidence to show that the allotment of shares to them should be canceled.

The allotment of shares is a contract or arrangement (*Quinn v. Robb* (1916) 141 L. T. Jo. 6; *Neal v. Quinn* [1916] W. N. 223, 141 L. T. Jo. 90), but art. 80 is the answer to my objection on that ground. There was no converse article in this case as there was in *Neal v. Quinn*. If one of the many motives for the allotment was to control the voting power, that is not enough to invalidate the whole allotment.

Duka, for the defendant company.

Tomlin, K.C., in reply.

Peterson, J., stated the facts as above set out, and continued:

The question is whether the directors were justified in acting as they did, or whether their conduct was a breach of the fiduciary powers which they possessed under the articles. What they did in fact was to override the wishes of the holders of the majority of the shares of the company for the time being by the issue of fresh shares issued solely for that purpose. There are two cases to which my attention [83] has been called. One is *Fraser v. Whalley* (1864) 2 Hem. & M. 10, 27-29, 71 Eng. Reprint, 361, in which there are some observations which are in point, though I agree that the case had points of difference from the present case. The learned judge in that case came to the conclusion that the directors were not justified in using their powers for a purpose which had once been authorized but which had come to an end. In the course of the argument the Vice Chancellor remarked: "No doubt both sides think their views the best for the company. But have you a right to force your views upon the majority of the shareholders by the exercise of a power of this

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kind?" In his judgment the Vice Chancellor said: "I cannot look upon these directors otherwise than as trustees for a public company, and I must judge of the propriety of their conduct in this matter on the ordinary principle applicable to cases of trustee and *cestui que trust*. . . . But . . . the point is reduced to this—the directors are informed that at the next general meeting they are likely to be removed; and therefore, on the very verge of a general meeting, they, without giving notice to anyone, with this indecent haste and scramble which is shown by the times at which the meetings were held, resolve that shares are, on the faith of this obsolete power intrusted to them for a different purpose, to be issued for the very purpose of controlling the ensuing general meeting. I have no doubt that the court will interfere to prevent so gross a breach of trust. I say nothing on the question whether the policy advocated by the directors, or that which I am told is to be pursued by Savin, is the more for the interest of the company. That is a matter wholly for the shareholders. . . . If the directors can clandestinely, and at the last moment, use a stale resolution for the express purpose of preventing the free action of the shareholders, this court will take care that, when the company cannot interfere, the court will do so." It was said that the real point of that case was that the directors were using what the Vice Chancellor calls a stale resolution, but I think the real substance of his judgment is that the directors were not entitled to issue shares for the express purpose of preventing the free action of the shareholders. [84] In *Punt v. Symons & Co.* [1903] 2 Ch. 506, 515, the question was again somewhat similar to that in the present case. Byrne, J., in a reserved judgment, after dealing with the first point, which is immaterial for the present purpose, says this: "I now come to the last and most important point. It is argued on the evidence that but for the issue by the directors of the shares under their powers as directors, and, therefore, in their fiduciary character under the general power to issue shares, it would have been impossible to pass the resolution proposed; and that the shares were not issued bona fide, but with the sole object and intention of creating voting power to carry out the proposed alteration in the articles." The shares, he says, were not issued bona fide for the general advantage of the company,

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but they were issued with the immediate object of controlling the holders of the greater number of shares in the company, and of obtaining the necessary statutory majority for passing a special resolution. Then he continues: "A power of the kind exercised by the directors in this case is one which must be exercised for the benefit of the company; primarily it is given them for the purpose of enabling them to raise capital when required for the purposes of the company. . . . When I find a limited issue of shares to persons who are obviously meant and intended to secure the necessary statutory majority in a particular interest, I do not think that is a fair and bona fide exercise of the power." The basis of both cases is, as I understand, that directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders. That is, however, exactly what has happened in the present case. With the merits of the dispute as between the directors and the plaintiff I have no concern whatever. The plaintiff and his friends held a majority of the shares of the company, and they were entitled, so long as that majority remained, to have their views prevail in accordance with the regulations of the company; and it was not, in my opinion, [85] open to the directors, for the purpose of converting a minority into a majority, and solely for the purpose of defeating the wishes of the existing majority, to issue the shares which are in dispute in the present action.

In my opinion, therefore, the issue of the shares in question to the four defendants was a breach on the part of the directors of their fiduciary powers. In the case of the last two allotments, those to Mr. Skellett and Mr. Wainwright, they were made to them with their full knowledge that the allotments were being made for the illegitimate purpose which I have described. I am therefore of opinion that these four allotments were invalid and ought to be declared void.

Solicitors: *Pepper, Tange, & Watson, for Pepper, Tange, & Winterton, Birmingham; Timbrell & Deighton, for C. Upfill Jagger, Birmingham.*

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Note.—Legality of issue or sale of stock intended to enable directors to gain or retain control of company.

The authorities are agreed that stockholders of corporations are entitled, upon the issue of corporate stock, to subscribe for a fractional part thereof proportionate to their holdings, and that an attempted violation of this right by directors in issuing new stock to themselves, or their friends, for the purpose of gaining or retaining control of the company, is a breach of trust which is illegal and redressible. *Snelling v. Richard* (1909) 166 Fed. 635; *Schmidt v. Pritchard* (1907) 135 Iowa, 240, 112 N. W. 801; *Trask v. Chase* (1910) 107 Me. 137, 77 Atl. 698; *Essex v. Essex* (1905) 141 Mich. 200, 104 N. W. 622; *Humboldt Driving Park Asso. v. Stevens* (1892) 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568; *Way v. American Grease Co.* (1900) 60 N. J. Eq. 263, 47 Atl. 44; *Gillette v. Noyes* (1904) 92 App. Div. 313, 86 N. Y. Supp. 1062; *Whitaker v. Kilby* (1907) 55 Misc. 337, 106 N. Y. Supp. 511, affirmed in (1907) 122 App. Div. 895, 106 N. Y. Supp. 1149, appeal from which is denied in (1908) 123 App. Div. 914, 108 N. Y. Supp. 1150; *Witherbee v. Bowles* (1911) 201 N. Y. 427, 95 N. E. 27; *Morris v. Stevens* (1897) 178 Pa. 563, 36 Atl. 151; *Electric Co. of America v. Edison Electric Illuminating Co.* (1901) 200 Pa. 516, 50 Atl. 164; *Glenn v. Kittanning Brewing Co.* (1918) 259 Pa. 510, L.R.A. 1918D, 738, 103 Atl. 340, Ann. Cas. 1918D, 769; *Luther v. C. J. Luther Co.* (1903) 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69; *Fraser v. Whalley* (1864) 2 Hem. & M. 10, 71 Eng. Reprint, 361, 11 L. T. N. S. 175; *Punt v. Symons & Co.* [1903] 2 Ch. 506, 72 L. J. Ch. N. S. 768, 52 Week. Rep. 41, 10 Manson, 415; *PIERCY v. S. MILLS & Co.* (reported herewith) *ante*, 11.

And a similar result has been reached where there was an attempt of this kind to dispose of stock held by the company, which had been previously issued. *Elliott v. Baker* (1907) 194 Mass. 518, 80 N. E. 450; *Hilles v. Parrish* (1862) 14 N. J. Eq. 380. But compare *State ex rel. Page v. Smith* (1876) 48 Vt. 266, set forth *infra*.

The court in *Trask v. Chase* (1910) 107 Me. 137, 77 Atl. 698, *supra*, said: "The directors of a corporation stand in fiduciary relations to it and to its stockholders. They are trustees. They are held to the exercise of the utmost good faith. It is commonly stated in the cases that they are the trustees and the corporation and stockholders are the *cestuis que trustent*. They manage the corporation for the benefit of the stockholders. Holders of the majority of the stock have a right to control the corporation. It is a fraud for the directors or a majority of them to take advantage of a temporary ascendancy in the board of directors to so manipulate the

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sale and issue of stock as to oust the control from the majority of the stockholders, and secure it to themselves, and equity will afford relief."

And in *Glenn v. Kittanning Brewing Co.* (1918) 259 Pa. 510, L.R.A.1918D, 738, 103 Atl. 340, Ann. Cas. 1918D, 769, *supra*, the court said: "No rule is better established than that the directors of a corporation stand in the position of trustees for the entire body of stockholders; and while stock owned by the director is his individual property, to be dealt with as he sees fit, in the same manner and to the same extent as other stockholders, yet, when he acts in his official position, he is acting not merely as an individual, but as representative of others, and is prohibited from taking advantage of his position for his personal profit or to reap personal benefit to the detriment of the stockholders whom he represents. Whenever there is an intimation that a director has violated the duty thus imposed upon him by virtue of his office, or has failed to act fairly and honestly toward those whom he represents, the law ceases to look at the mere form of the device or means employed and 'pierces through the surface, and seizes upon the evils which lie within.' . . . The circumstances under which the stock in controversy was issued and purchased by one of the directors who voted for the resolution were adequate to raise a doubt of the good faith of the directors. Assuming the resolution was proper and there was sufficient reason for issuing the stock, the directors who were present at the meeting had no right to subscribe for the new issue without first notifying all stockholders and affording them an opportunity to take up the stock in proportion to the amount of the shares already held by them. This is especially true, in view of the long-standing dispute between the two factions, and the attempt by both to obtain a controlling interest. The directors, as a board, had knowledge of this fact, and there were consequently particular reasons requiring them to act impartially and in the interest of the stockholders as a whole. The former were bound to give notice and afford the latter an opportunity to subscribe for the stock on equal terms, and it is immaterial that such additional issue was made long after the business of the company was begun."

It will be observed that in the reported case (*PIERCY v. S. MILLS & Co. ante*, 11), it was held a breach of the fiduciary power of directors to issue shares in the company to raise capital when necessary, where they issued shares simply and solely for the purpose of themselves retaining control of the company.

And in one of the cases relied on (*Punt v. Symons & Co.* [1903] 2 Ch. 506, 72 L. J. Ch. N. S. 768, 52 Week. Rep. 410, 10 Manson, 415), where a majority of the directors issued shares with the object of controlling the holders of a majority of the stock, and passing
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a certain resolution, and not for the general advantage of the company, an injunction was issued restraining the holding of a confirmatory meeting.

The decision in the preceding case was based on *Fraser v. Whalley* (1864) 2 Hem. & M. 10, 71 Eng. Reprint, 361, 11 L. T. N. S. 175, where directors of a railway company, who were informed that they were likely to be removed at the next general meeting, on the verge of the meeting, and without giving notice, resolved, on authority which was obsolete, the purpose having ceased, that certain shares be issued, for the purpose of controlling the coming meeting, and an injunction was issued restraining the issue of such shares.

In *Luther v. C. J. Luther Co.* (1903) 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69, where, with a view of obtaining a majority of the stock, a majority of the directors voted to issue shares of stock to a confédérate, to secure control and direction of the company, it was held that such issue, without giving other shareholders an opportunity to subscribe *pro rata*, was invalid, and a breach of duty on the part of the directors, and that as against a purchaser having knowledge of the breach an order of cancelation was proper.

And in *Snelling v. Richard* (1909) 166 Fed. 635, where a majority of the directors purposed to issue and sell stock to persons friendly to them, without giving majority stockholders an opportunity to subscribe for their proportionate share, in order to control a meeting for election of directors, an injunction was granted restraining them from issuing the stock without giving the stockholders a reasonable opportunity to take their proportionate shares, and from voting, or permitting anyone to vote, on stock issued in violation of the majority stockholders' rights.

In *Way v. American Grease Co.* (1900) 60 N. J. Eq. 263, 47 Atl. 44, where directors gave existing stockholders no opportunity to subscribe for new stock in proportion to their holdings, but sold it to relatives and friends of the directors at much less than the par value in order to maintain themselves in office in defiance of the existing majority of stockholders, it was held that as to the latter the transaction was fraudulent, and an injunction was granted restraining the holders of the stock so sold from voting thereon. The court said: "The directors' duty in issuing new shares was to afford to the existing stockholders an opportunity to take the proposed new issue in the proportion in which the shares were held by them. In many cases corporations are incorporated, capitalized, and organized by stockholders upon expectations based upon the maintenance of control by the existing majority of the holders of the stock. The power of distributing a new issue does not lie at the mere choice of directors. It is not a prerequisite which they may use for their private advantage. They may not overthrow or secure for themselves

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the control of the corporation by means of a new issue of stock. This is true whether as to a part of the stock authorized by the original incorporation which remains untaken (*Reese v. Bank of Montgomery County* (1857) 31 Pa. 78, 72 Am. Dec. 726), or as to stock issued after incorporation, on a subsequently authorized increase (*Gray v. Portland Bank* (1807) 3 Mass. 364, 3 Am. Dec. 156). The directors in the case under consideration wholly ignored the right of the existing stockholders to subscribe for the new issue, and issued the shares for a nominal price, as stated, to their selected friends, and thus sought to secure for themselves their continued control of the company. The power of directors of corporations has, under the authority of the American decisions, been quite widely extended, but, in my view, cannot be held to sustain such transactions as are here under judgment."

And in *Glenn v. Kittanning Brewing Co.* (1918) 259 Pa. 510, L.R.A.1918D, 738, 103 Atl. 340, Ann. Cas. 1918D, 769, where there were two factions in a corporation and the majority of the directors, who represented a minority of the stock, in order to gain control, voted to sell any portion of a certain number of shares of stock which had never been issued (but which were referred to in the resolution as "treasury stock"), and a sufficient number of shares to give control were accordingly sold to one of such directors, without giving other stockholders an opportunity to purchase a proportionate part of the stock, it was held that there was a breach of trust by the directors, and that equity might set the transaction aside.

And to the same effect is *Morris v. Stevens* (1897) 178 Pa. 563, 36 Atl. 151.

And where a sale of unissued stock was made at a grossly inadequate price by a majority of the directors to a friend having knowledge of the facts, not for the purpose of replenishing the treasury, but to enable such directors to increase their voting power sufficiently to give control of the corporation and keep themselves in office, the transaction was held fraudulent as to the minority, and the sale was set aside. *Essex v. Essex* (1905) 141 Mich. 200, 104 N. W. 622.

And in *Whitaker v. Kilby* (1907) 55 Misc. 337, 106 N. Y. Supp. 511, affirmed in (1907) 122 App. Div. 895, 106 N. Y. Supp. 1149, appeal from which is denied in (1908) 123 App. Div. 214, 108 N. Y. Supp. 1150, where a company was in urgent need of funds, and, ostensibly to raise them, at a directors' meeting at which the director owning the majority of the stock was not present, a resolution was passed that a certain number of unissued shares should be sold, and that the superintendent should be instructed to obtain subscriptions therefor, and the latter subsequently reported that he could not obtain subscriptions, and the directors who voted the sale thereupon

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subscribed for the stock without knowledge on the part of the director previously holding the majority of the stock, with the result that he became a minority stockholder, it was held, it also appearing that the directors voting for the issue had secret knowledge of a contract which was of great value to the company, that the transaction was inequitable, and that an injunction would be granted preventing the use by the purchasers of the stock so issued to the detriment of the director previously holding the majority of the stock.

And in *Trask v. Chase* (1910) 107 Me. 137, 77 Atl. 698, where, contrary to a vote passed at the annual stockholders' meeting, a majority of the directors, who owned less than a majority of the stock, issued to one of their number part of the capital stock unissued, for the purpose of securing control of the affairs of the company, and preventing the plaintiffs, who were minority directors and were given no opportunity to subscribe, from retaining a majority of the stock, it was held that there was a violation by the directors of their trust and that equity would compel the surrender and cancellation of the stock so issued.

And where the officers and directors of a corporation for the purpose of keeping control increased the stock, and issued some of it to stockholders favoring them, who were not entitled thereto, and refused to issue the plaintiffs their share, such issue was held illegal, and a cancellation thereof, and a reissue of the stock wrongfully allotted to those entitled thereto was ordered. *Schmidt v. Pritchard* (1907) 135 Iowa, 240, 112 N. W. 801.

And in *Humboldt Driving Park Asso. v. Stevens* (1892) 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568, where, shortly before a stockholders' meeting, a holder of a few shares, for the purpose of defrauding stockholders and obtaining control of the corporation, induced the secretary to issue to him a large number of shares, never authorized, and procured the votes on such shares to be counted in electing directors, and the votes on valid shares to be thrown out, it was held that the issue of the stock to such person was unlawful, and that an injunction should be issued restraining the directors thus elected from acting, or issuing certificates of stock.

And in *Witherbee v. Bowles* (1911) 201 N. Y. 427, 95 N. E. 27, a complaint was held to state a good cause of action which alleged a conspiracy by the defendants, in pursuance of which the plaintiff's stock in a corporation was fraudulently sold by the defendants; that the latter, being in power, fraudulently caused the corporation to issue to one of the defendants in purported payment for properties of little value a large amount of new stock, sufficient to control the corporation, and that this stock was subsequently distributed among the defendants, it being held that under such circumstances the complainant was entitled to have the stock delivered up and canceled.

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And in *Electric Co. of America v. Edison Electric Illuminating Co.* (1901) 200 Pa. 516, 50 Atl. 164, it was held that a majority of the directors, who represented a minority of the stockholders, had no power to sell certain shares proposed to be issued to the highest bidder without offering shareholders a chance to subscribe *pro rata* to the new stock, even if they did not do so for the purpose of gaining a majority of the stock, much less if they had such purpose.

And in *Hilles v. Parrish* (1862) 14 N. J. Eq. 380, where the board of directors by a colorable sale caused six shares of stock belonging to the company which had apparently been before issued to be transferred to themselves, with the design of retaining themselves in office by giving them a majority, and thereby defeating the control of others who before held a majority of the stock, it was held that the transfer of the stock must be set aside and the holders enjoined from voting it.

And in *Elliott v. Baker* (1907) 194 Mass. 518, 80 N. E. 450, the evidence was held to show that there were two factions among the stockholders, and that a majority of the board of directors, without giving all stockholders an opportunity to purchase, issued treasury stock to minority stockholders, who were their friends, in order to give them control of the company; that the issue was not made in good faith; that it was not necessary to raise money for the business by this means, and that under the circumstances the price obtained was not the highest that could have been realized, and it was held that there had been a breach of trust by the directors, and that the issue of stock complained of should be canceled.

But in *Gillette v. Noyes* (1904) 92 App. Div. 313, 86 N. Y. Supp. 1062, where holders of a majority of the stock in a corporation sought a temporary injunction against minority stockholders and officers, constituting a majority of the directors, enjoining them from holding a special meeting and selling sufficient treasury stock to render the complainant a minority stockholder and prevent his controlling the next election of directors, he was held not entitled to the relief asked. The court said: "It is evident that there is a serious disagreement between the plaintiff, who owns or controls a majority of the outstanding stock, and the individual defendants, who, although minority stockholders, constitute a majority of the board of directors. It is manifest that the plaintiff's object in bringing the action was not to obtain a permanent injunction, but to temporarily enjoin the board of directors from selling sufficient treasury stock to render him a minority holder of the outstanding stock and prevent his controlling the next election of directors. This would be accomplished by the temporary injunction order restraining further sales of stock until after the special meeting of the stockholders to increase the number of directors at which, by reason of his control-

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ling interest in the outstanding stock, he could secure the election of two individual directors friendly to his interests. We are of opinion that the plaintiff was not entitled to the temporary injunction order, and that the order, in so far as it is appealed from by the plaintiff, should be reversed."

In *State ex rel. Page v. Smith* (1876) 48 Vt. 266, the rule applicable in case of new stock, under which stockholders have a right to subscribe in proportion to their holdings, was held not applicable to stock which had once been issued and subsequently purchased by the company, and an actual sale of such stock for which full value was paid, was held valid, although the main inducement was to enable the purchaser and his friends to control the board of directors.

J. T. W.

[ENGLISH COURT OF APPEAL.]

FANSHAW and Another (Trading as Adams & Company) v.
KNOWLES.

[1916] 2 K. B. 538.

Also Reported in 85 L. J. K. B. N. S. 1735, 115 L. T. N. S. 339.

Trial — Civil cases — Separation of jury after summing up — Validity of verdict.

The separation of the jury in a civil case after the judge's summing up does not, as a matter of law, invalidate the verdict; but is simply a circumstance which, with other circumstances, ought to be taken into account by the court in determining whether or not a new trial should be granted.

— Verdict — Attempted conditions — Validity.

The fact that the jury in a civil case sought to attach a condition to their verdict does not invalidate their verdict where, upon being informed by the judge that they could not do so, they answered without the condition.

The history of the law as to separation of juries considered.

(May 30, 1916.)

APPEAL of defendant for judgment or new trial of an action tried before Darling, J., and a special jury.

The following statement of facts is taken from the judgment of the Lord Chief Justice:

In this case the plaintiffs brought an action for damages for
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breach of three contracts. There were separate defenses to two of the contracts, and there was one defense which was common to all; namely, that by the conduct of the plaintiffs the defendant was [539] entitled to refuse to perform the contract, by reason of nonpayment of amounts due by the plaintiffs to the defendant which amounted to a repudiation before breach. The learned judge summed up to the jury and left to them questions with regard to each of the contracts. The jury retired to consider their verdict in the evening and eventually returned into court with the statement that they were agreed as to the first and second questions, which meant as to the first and second contracts, but were not agreed as to the third. They were then told by the associate to attend the next morning, when the judge would be present, in case the learned judge wished to put further questions to them. On the next morning when the jury returned they said that they found a verdict for the plaintiffs on the first and second contracts, and assessed the damages on the first contract at 52*l.* 7*s.* 11*d.* On the second contract they were not agreed as to giving any damages or considering the damages unless they could also consider the third contract, and added that, if their verdict was not accepted on the third contract, they withdrew it on the second. The meaning of that observation was that on their return in the morning objection was taken by the defendant that they could not give a verdict as they had separated over night. The learned judge then told them that they must give their verdict, and in substance that they could not attach the condition which they sought to impose. Then they said that they found for the plaintiffs on the second contract without damages, and had agreed on their verdict on the third contract for the plaintiffs for 1,000*l.* damages. Thereupon the learned judge thought the best course was to take the verdict and enter judgment and leave the parties to move this court. Judgment was then entered, and the recital of the findings of the jury, but the judgment was only in respect of the first and the third contracts. Thereupon judgment was entered for 1,052*l.* 7*s.* 11*d.*

The defendant appealed.

F. A. Greer, K.C., and T. Edwards Forster, for the appel-
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lant. It is submitted that the verdict cannot stand. After the judge had summed up and charged the jury he left the court. The jury then deliberated in private, and after some time came into court and stated that they were agreed on the first and second points, but not [540] on the third point. They separated and were at large for one night, and had the opportunity of discussing the case with other persons. The next morning they were agreed on their verdict, and it was obviously a compromise verdict. The appellant's counsel objected the next morning to any verdict whatever, but the judge took it. In criminal cases the rule is strict that the jury must deliberate together and in private without separating. *Rex v. Ketteridge* [1915] 1 K. B. 467, [1915] W. N. 11, 84 L. J. K. B. N. S. 352, 112 L. T. N. S. 783, 79 J. P. 216, 31 Times L. R. 115, 59 Sol. Jo. 163. It is submitted that there is no distinction between criminal and civil cases. In *Rex v. Willmont* (1914) 10 Cr. App. Rep. 173, 30 Times L. R. 499, 78 J. P. 352, the clerk of assize went to the jury and asked them if they were agreed, and answered some questions they put to him, and the verdict was set aside. In *Goby v. Wetherill* [1915] 2 K. B. 674, [1915] W. N. 188, 84 L. J. K. B. N. S. 1455, 113 L. T. N. S. 502, 79 J. P. 346, 31 Times L. R. 402, a verdict in a county court was set aside by a Divisional Court. That decision is not binding on this court, but it is based, we submit, on a right principle. *Rex v. Kinneer* (1819) 2 Barn. & Ald. 462, 106 Eng. Reprint, 434, also reported 1 Chitty, 401, *sub nom.* *Rex v. Woolf*, where there is a long note on the subject, may be cited against us, but there the jury separated before the summing up of the judge. The rules as to juries are stated in Bro. Abr., pl. 17 and 19; Bac. Abr. Juries, p. 768; 2 Co. Litt. 227b; Hale's Pleas of the Crown, 2, 297.

The Juries Act 1870 (33 & 34 Vict. chap. 77), § 23, granted some relaxation of the strict rules as to keeping juries without food or fire; and the Juries Detention Act 1897 (60 & 61 Vict. chap. 18), § 1, gives the judge a discretion to allow the jury to separate in some cases of felony, but only "before the jury consider their verdict." That limitation shows that the rule is still strict after they have once retired for that purpose.

Waugh, K.C., and G. W. Powers, for the respondents.
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There has always been a marked difference between the treatment of juries in civil cases and in criminal cases. All the authorities cited for the appellant were criminal cases except *Rex v. Kinnear* (1819) 2 Barn. & Ald. 462, 106 Eng. Reprint, 434, also reported 1 Chitty, 401, *sub nom. Rex v. Woolf*, where there is a long note on the subject, and that is a distinct authority that the separation of the jury before verdict is not in itself enough to make a verdict invalid.

In 2 Co. Litt. 227b, etc., it is stated that in cases between parties, if the jury agree upon a verdict after the judge has left the court, they may give a privy verdict, either before him or any other judge, [541] and may then separate and afterwards give a public verdict in open court, which must be before the judge who tried the case, but upon giving the public verdict they may alter their privy verdict. The practice is stated in the same way in Blackstone, iii. 375.

In *Lord Fitzwater's Case* (1675) Freem. C. L. Rep. 414, 415, 89 Eng. Reprint, 308, the jury had given a privy verdict over night and altered it in the morning without having had any opportunity of discussing it. The court held the verdict bad because they had not discussed it. If the argument of the appellant is correct, the jury were incapable of discussing anything, and the court would not have given their not having further discussed the verdict as a reason for its being bad. If they had met together it would have been good.

Lord St. John v. Abbot (1735) Barnes, 441, 94 Eng. Reprint, 994, is a clear authority that the fact that the jury had separated may be a misdemeanor, for which the jury might be punished or fined, but could not invalidate the verdict. The true rule is that the judge had always a discretion in civil cases to allow the jury to separate, and the court will not assume that the jury have been approached or influenced by reason of the separation, unless there was some evidence of such interference, or the judge considered the verdict against the weight of evidence. Even in the time of Elizabeth a custom had arisen of allowing the jury after they had given a privy verdict to eat, drink, and lie together (*Saunders v. Freeman* (1561) 1 Plowd. 209, 211, 75 Eng. Reprint, 321); and the custom has steadily grown less oppressive. But

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all through there has been a marked distinction between juries in civil cases and in criminal cases. Their origin was different; the civil jury grew out of the Great Assize of Henry II.; petty juries for criminal cases were established by legislation in the time of Edward I. Before that time persons accused of crime were presented by the grand jury, but were tried by ordeal. In early times all crimes were felonies. Misdemeanors were first recognized in the time of Edward II. Greater strictness was naturally required in criminal cases both because the jury were dealing with life and liberty and there was no appeal, and because there was a constant dread of the juries being tampered with by the Crown. Therefore if in a criminal case there was any opportunity of the jury being tampered with the whole [542] proceedings were held to be void, and the verdict was set aside without any evidence that interference had actually taken place. But in civil cases the court will assume that all was done properly, unless there is evidence of irregularity or misconduct affecting the verdict. Even proof of misconduct on the part of a juror will not necessarily affect the verdict unless it were instigated by one of the parties or otherwise affected the verdict. *Subey v. Stephens* (1862) 7 L. T. N. S. 274, 11 Week. Rep. 19.

T. Edwards Forster, in reply.

Lord Reading, C.J. (after stating the facts as above): The defendant appeals to this court on two grounds: First, that the verdict is no verdict and is voided by the separation of the jury overnight; and, secondly, that the verdict upon the third contract was a compromise verdict and could not be allowed to stand, and that in substance there was no verdict as to the second contract.

Now the first point is one of importance and involves the proposition put forward by the defendant that no verdict can stand in a civil trial when the jury have been allowed to separate after the learned judge has summed up and the jury have been given in charge of the officer of the court to consider their verdict. In support of this proposition there is only one case of trial of a civil action which was cited to us,—*Goby v. Wetherill* [1915] 2 K. B. 674, [1915] W. N. 188, 84 L. J. K. B. N. S. 1455, 113 L. T. N. S. 502, 79 J. P. 346, 31 Times L. R. 402. The decision of the 10 B. R. C.

Divisional Court in that case was that the presence of a stranger in the room with the jury for a substantial time whilst the jury were deliberating upon and considering their verdict is in itself sufficient to invalidate the verdict. The court came to the conclusion in that case that they would not inquire, and ought not to inquire, as to what had happened. They thought it was sufficient to invalidate the verdict that there had been a stranger present during the deliberations of the jury, which must take place in private, and therefore they set it aside. But that case does not really touch the proposition which has been discussed before us. There the question was not one of separation of the jury, but of the presence of a stranger in the room with the jury; and no case has been cited to us which supports the proposition of the defendant in this appeal. With regard to the separation of juries in criminal [543] trials, the most recent case is *Rex v. Ketteridge* [1915] 1 K. B. 467, [1915] W. N. 11, 84 L. J. K. B. N. S. 352, 112 L. T. N. S. 783, 79 J. P. 216, 31 Times L. R. 115, 59 Sol. Jo. 163. In the words of Lush, J., delivering the judgment of the Court of Criminal Appeal [1915] 1 K. B. 470: "If a juror, after the judge has summed up, in any criminal trial, separates himself from his colleagues, and, not being under the control of the court, converses or is in a position to converse with other persons, it is an irregularity which, in the opinion of the court, renders the whole proceedings abortive, and the only course open to the court is to discharge the jury and commence the proceedings afresh." Moreover the court did not think it relevant to consider what had actually taken place, nor whether the irregularity had in fact prejudiced the prisoner. Other cases to a similar effect were cited which are all collected in *Rex v. Ketteridge*. That decision laid down the rule applicable in a criminal trial. It did not purport to decide that the same rule would apply in the case of a civil trial. The question this court has now to consider is whether the reasoning in those cases and the decisions cited, including *Rex v. Ketteridge*, should apply where the jury separates after the summing up of the judge and the jury have retired to consider their verdict; and whether the fact of their separation and return the next morning to the court to give a verdict renders that verdict invalid.

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We have had the advantage of an interesting and learned argument upon the subject. The defendant has urged that the same rule must apply in a civil trial. On the other hand, it has been argued for the plaintiffs that the old rule of law which would prevent the separation of the jury before they give their verdict after they have retired to consider it is one that no longer applies to civil trials; that the rigidity of the old rule has been relaxed in civil trials, just as it has been relaxed even in criminal trials, partly by custom, and recently by the Juries Detention Act 1897. In 2 Coke upon Littleton, 227b, it is stated that "by the law of England a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle, which some bookes call an imprisonment, and without speech with any, unlesse it be the bailife, and with him onely if they be agreed. After they be agreed they may in causes between party and party give a verdict, and if the court be risen, give a privy [544] verdict before any of the judges of the court, and then they may eat and drinke, and the next morning in open court they may either affirme or alter their privy verdict, and that which is given in court shall stand. But in criminall cases of life or member, the jury can give no privy verdict, but they must give it openly in court." It is clear, therefore, that at the time of this work being written there was a distinction to be drawn between civil and criminal cases. In the one case, that is, in the civil trial, a privy verdict could be given, and then the jury were allowed to eat and drink, and they could either confirm or alter that verdict, that is, that privy verdict, when the verdict was given as a public verdict. In Blackstone's Commentaries, iii. 377, it is stated, dealing with verdicts between party and party, that "a verdict is either privy or public. A privy verdict is when the judge hath left or adjourned the court; and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court; which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in court; wherein the jury may, if they please, vary from the privy verdict. So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, allowing time for the parties to tamper with

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the jury, and therefore very seldom indulged." It appears, therefore, that the jury, when they had once agreed, could return an informal verdict called a privy verdict, and that when they had done that they were entitled to eat and drink, as is said in Coke upon Littleton, which was already a relaxation of the rigidity of the old rule; and in Blackstone's time he says that when they were agreed they gave their privy verdict in order to be delivered from their confinement. It seems, therefore, not only were they allowed to eat and drink if they had given their privy verdict, but in Blackstone's time they were no longer confined, and they could on the next morning, when they gave their public verdict, alter the privy verdict or affirm it as they pleased. Now that shows that when Blackstone's Commentaries were written it was clear that in civil trials juries were allowed to give a verdict after they had separated. The progress in the liberty afforded to juries is shown by the allowance of the release from confinement, which is stated in Blackstone, but not in Coke upon Littleton; and even in Coke [545] upon Littleton a reference to the case of *Saunders v. Freeman* (1561) 1 Plowd. 211, 75 Eng. Reprint, 321, shows that after there had been a privy verdict the jury were then allowed to eat and drink and lie together. It appears to have been by custom that juries were allowed to do this. The words are: "And then the same juries for their ease as is the custom to eat and drink together for them aforesaid and to lie together until the morrow aforesaid and then to give their verdict aforesaid openly before the aforesaid justices at Northampton." So that, going back to the time of Queen Elizabeth, there had already existed some relaxation which is shown by the custom mentioned in Plowden, and extended gradually till we get to the date of Blackstone's Commentaries.

In Bacon's Abridgment there is to be found a very useful passage upon this subject, 7th ed. vol. 8, p. 107. Reference is made to two cases, one of which is *Lord St. John v. Abbot* (1735) Barnes, 441, 94 Eng. Reprint, 994. There the jury withdrew to consider their verdict after receiving the charge. They came into court before the learned judge had risen, and asked a question, received the answer, and again withdrew. Later on, on the same day in the afternoon, the judge was in-

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formed that two or three of the jurors were in court, evidently having separated from the rest. They were asked by the judge what they did there, and they answered that they and their fellows could not agree on a verdict. They were ordered to go to their fellows. A verdict was afterwards given for the plaintiff, and the judge did not report that it was contrary to the evidence. Then it was sought to set aside the verdict, but the court held it to be good. The court thought some of the jurors had been guilty of a great misbehavior and were liable to be fined, but they thought the plaintiff had not been guilty of any misbehavior and that the verdict ought to stand. Now in that case it is to be noted there had been a separation of the jurors after the charge had been received, after they had retired to consider their verdict, and before they had returned their verdict; nevertheless the court held that the verdict stood. But the learned judge who tried the case did not report that the verdict was contrary to the evidence, a factor which must always be borne in mind when considering these questions. Later, in *Lord Fitzwater's* [546] *Case* (1675) *Freem. C. L. Rep.* 414, 415, 89 *Eng. Reprint*, 308, the jury were divided in opinion. They threw dice for whom they should find a privy verdict, and they accordingly found their privy verdict for the party in whose favor the dice came. Without conferring afterwards together they gave a verdict for the same party in open court. Their verdict was set aside. The court said, *Bacon Abr.* 7th ed. vol. 8, p. 107: "As our estates, liberties, and lives are in the power of jurors, they ought to be very circumspect in their conduct. In this case the jurors have behaved very improperly, for they were determined by chance in the finding of their privy verdict; and they had not any conference together afterwards, before they gave their verdict in open court." There again it is to be observed that the court thought that the verdict should be set aside, as the jurors had not had any conference together after they had returned the privy verdict arrived at only by the casting of dice. It does not follow, and I do not think that it must be understood, that if they had afterwards conferred together the court would have held the verdict good. It was sufficient for the court to say they had thrown dice for the privy verdict, and had afterwards without conference found their pub-

lie verdict in accordance with the privy verdict. But if the law was as contended by the defendant, that the jury could not separate, why should the court have laid stress upon the absence of conference by the jury before they returned their public verdict? On the whole, consideration of these authorities indicates that this old rule had by custom gradually been relaxed until jurors were allowed to separate before giving their verdict in civil cases. *Rex v. Kinnear* (1819) 2 Barn. & Ald. 462, 106 Eng. Reprint, 434, was pressed very much upon us. That was a case upon the trial of an indictment for misdemeanor. There the jury had separated at night without the knowledge or consent of the defendants. It was held in that case that the verdict was not thereby invalidated, and the court refused to grant a new trial, it not appearing that there was any suspicion of any improper communication having taken place. I refer to that case only as showing that even in criminal trials there had already, as is now well known, grown up a practice of allowing juries to separate in trials for misdemeanor during the hearing, which was not permitted in cases of felony. The only observation [547] I wish to make upon it is that, although it shows some relaxation, it must not be assumed that in anything I am stating here to-day I intend to depart from the rule applicable to criminal trials. There are reasons why that rule should be more rigidly enforced in criminal trials. It is sufficient to say that we have not to consider that to-day, and, so far as I am able to judge, there is no reason for departing in any way from the decision of the Court of Criminal Appeal in the case of *Rex v. Ketteridge* [1915] 1 K. B. 467, [1915] W. N. 11, 84 L. J. K. B. N. S. 352, 112 L. T. N. S. 783, 79 J. P. 216, 31 Times L. R. 115, 59 Sol. Jo. 163, to which I have already adverted. The conclusion to which I have come upon this point is that in civil trials the separation of the jury does not invalidate the verdict. I think that it is a practice which should be resorted to only in rare instances and where special circumstances demand it. The danger of allowing the separation is pointed out by Blackstone. It is a danger which none the less exists in the present day. There are, of course, circumstances which make it necessary or desirable that the jury should return on the next day for the purpose of hearing a further

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direction from the judge, or perhaps of settling some point of controversy between the jury as to the evidence, or perhaps for some explanation of the summing up of the learned judge which some of the jury may not properly have appreciated. The practice in modern times has been, within the knowledge of all who practise in these courts, to allow a verdict to stand which is given after the consideration of the jury in such a case as the present. It does not happen often, and no doubt for the reason which I have pointed out it is thought undesirable by the judges that it should happen; nevertheless it may happen, and when it does, unless there is something more in the case and in the circumstances of the finding of the verdict than the mere fact of the separation of the jury, the verdict will not be invalidated. In a case in which a judge has come to the conclusion that the verdict was unsatisfactory in his opinion, and made a note to that effect, and this court has then had to consider the verdict of the jury, or where there are other circumstances which throw some suspicion upon the verdict, it is, in my opinion, open to the court to set aside the verdict. It is a matter for the discretion of the court. It is not a rule of law that the separation invalidates the verdict. I think the rule is that when there has been a [548] separation, that is a circumstance which, with other circumstances, ought to be taken into account and dealt with by the court. The first point relied upon by the appellant therefore fails.

With regard to the second point, I confess I cannot come to the conclusion that the verdict is wholly satisfactory, but then it is not for me to judge unless there are circumstances which show that as a matter of law this court is entitled to interfere. It cannot be satisfactory that a jury should hold the conversation which took place when they returned on the next morning, or that they should seek to impose conditions of their returning answers to the questions of the judge, neither could any such condition imposed by them be of any validity or effect. But we must address ourselves, in my view, to the case as presented to us to-day in the notice of appeal, and this verdict is attacked on the second point on the ground that the answer to the third question was in truth a compromise verdict. The notice of motion says that the verdict in respect of the third contract was improper and no real
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verdict inasmuch as it was made the subject of a condition by the jury, and that in law the verdict could not be given in a conditional alternative manner as aforesaid. I agree with that view, but it does not invalidate the verdict in this case, because the learned judge refused to accept the condition and said the jury must answer without the condition, which they did.

That, I think, disposes of the grounds taken by the defendant in this court. There is no other ground put forward. This notice of appeal is not based upon any misdirection of the learned judge, nor is it even alleged that the verdict was against the evidence, or that any evidence had been improperly admitted. The sole point taken, apart from the broad proposition on the first point, is that the jury attached a condition to their verdict. Now, looking at it as I think we must, having regard to the notice of appeal, I cannot think that that second point avails the defendant in this court. It cannot be substantiated, because the mere attaching of a condition by a jury is of no effect, and therefore I think that the appeal fails on the second point also. [His Lordship then dealt with the cross appeal, which claimed some merely formal alterations in the judgment entered, and continued:] In my opinion, therefore, the appeal of the defendant fails and the cross appeal of the plaintiffs succeeds.

[549] Warrington, L.J.: I am of the same opinion, and I only wish to add a very few words. The defendant contends that in a civil action the mere fact that the jury are allowed to separate avoids the verdict, that is, if they are allowed to separate after they have received the learned judge's charge and been asked to consider their verdict. Now I think the authorities which have been referred to as to the power of a jury to give a privy verdict are conclusive that that question must be answered against the contention of the defendant. Those authorities seem to me to establish this: First, that on giving such a verdict as that, the jury in recent times have been allowed to separate; secondly, that such a verdict was not final, but that when the jurors give their formal verdict they may, at any rate, where they have had a further consultation since their separation, either alter or reverse the privy verdict. If that is so, I think it follows necessarily that

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they may give that which alone is their final verdict after they have separated. In my opinion, therefore, the bare question which is asked here, namely, whether in a civil action after the jury have been charged they can be allowed to separate without avoiding their verdict, must be answered in the affirmative. On the rest of the case I have nothing to add.

Scrutton, J.: There are only three matters on which I wish to add anything to what the Lord Chief Justice has already said. In the first place, what we have said applies only to civil actions, and nothing we have said must be taken to interfere with the strictness with which the jury is dealt with in criminal cases. Secondly, I think that in civil actions the practice of juries separating should be resorted to as seldom as possible for the reason given by Blackstone: "It is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged." I cannot help noting, speaking for myself, that in this case and in the last case before the court considerable difficulty, if not the whole difficulty, has arisen from the fact that the learned judge who tried the case has not stayed while the jury were deliberating, so that when they have found themselves in difficulty they have not had the judge to advise them. I think myself it is the duty of the judge to stay to assist the jury so long as the jury are deliberating on their verdict; and the fact that in two cases here we have had [550] appeals which I think would have been prevented if the judge had stayed supports my own personal feeling on the duty of the judge in these matters. And, thirdly, I do not pretend that the answers given by the jury or the way in which they gave them entirely satisfy me. But the appellant in this case has not complained of any misdirection or absence of direction by the learned judge, and he has not complained of the findings of the jury being against the weight of evidence. We are left, therefore, simply with the point, Does the separation of the jury and the way in which they attempted to answer the questions until stopped by the learned judge afford ground for ordering a new trial? In my opinion the court should be slow to interfere unless it is satisfied that there is some substantial interference with justice, and when the appellant does

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not himself allege either any misdirection by the judge or that the finding is against the weight of evidence, I think the court should be slow to interfere as it is asked in this case.

Solicitors: *Indermaur & Brown, for Horner, Sampson, & Wood, Bradford; Rawson & Stevens, for W. E. Price, Leicester.*

Note.—Separation of jury in civil case as invalidating verdict.

I. Introductory, 38.

II. Separation during trial, 38.

III. Separation after submission of cause:

a. General rule, 40.

b. Cases holding separations fatal, 44.

c. Where statute requires admonishment, 47.

IV. Miscellaneous, 47.

I. Introductory.

This note excludes cases of sealed verdicts and of waiver of objections to separations of the jury.

As to the effect of permitting separation of the jury in a capital case, see the note to *Armstrong v. State*, 24 L.R.A. (N.S.) 776.

As to the right to permit a separation of the jury in criminal cases, other than capital, after finding but before rendition of verdict, see the note to *People v. Duffek*, 31 L.R.A. (N.S.) 1005.

As early as the Year Book, 14 Hen. VII. fol. 29, 15 Hen. VII. fol. 1, in the case of the Bishop of N. against the Earl of Kent, the question was much debated by the judges, but it seems not decided, as to whether jurors hearing a cause in the street and separated by a thunderstorm could thereafter bring in a valid verdict. See 1 Chitty, 401, note.

Sometimes the separations of the jury both during the trial and after the case is submitted are expressly provided for by statute.

II. Separation during trial.

Under the modern practice, separation of the jury in civil actions before the case is completed is immaterial.

ALABAMA.—*Louisville & N. R. Co. v. Holland* (1911) 173 Ala. 675, 55 So. 1001.

DISTRICT OF COLUMBIA.—*Cissel v. Hayden* (1914) 41 App. D. C. 477.

GEORGIA.—*Stancell v. Kenan* (1861) 33 Ga. 56; *Central of Georgia R. Co. v. Hall* (1899) 109 Ga. 367, 34 S. E. 605.

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ILLINOIS.—*Haines v. Thompson* (1906) 129 Ill. App. 436; *Johnson v. Wasson Coal Co.* (1912) 173 Ill. App. 414.

KENTUCKY.—*Smith v. Middlesboro Electric Co.* (1915) 164 Ky. 46, 174 S. W. 773, Ann. Cas. 1917A, 1164.

NEVADA.—*Abel v. Hitt* (1908) 30 Nev. 93, 93 Pac. 227.

NEW JERSEY.—*Crane v. Sayre* (1821) 6 N. J. L. 110.

NEW YORK.—*Eastman v. Tuttle* (1823) 1 Cow. 248; *Ex parte Hill* (1824) 3 Cow. 355; *Wilson v. Abrahams* (1841) 1 Hill, 207.

Where the statute requires admonishment.

Where the statute provides that the jury may separate before submission of the case on admonishment, the appellate court will not interfere with the discretion of the trial court in granting the separation. *San Antonio & A. P. R. Co. v. Bennett* (1890) 76 Tex. 151, 13 S. W. 319; *Noel v. Denman* (1890) 76 Tex. 306, 13 S. W. 318; *Kothman v. Faseler* (1904) — Tex. Civ. App. —, 84 S. W. 390. And this is true although the trial court was requested to keep the jury together during the trial, and refused to do so. *International & G. N. R. Co. v. McVey* (1907) 46 Tex. Civ. App. 181, 102 S. W. 172.

If the admonition has been given beforehand it need not be given on every accidental or occasional recess. *Gleason v. Strauss* (1897) 5 Kan. App. 80, 48 Pac. 881.

In *Stager v. Harrington* (1882) 27 Kan. 414, the court held: "We do not think that the recess of two or three minutes taken by the justice's court, without the justice's admonishing the jury, could possibly have worked any prejudice to the rights of either party. Neither party objected or took any exception at the time, and nothing prejudicial is shown."

In *Brandon v. Mullenix* (1872) 11 Heisk. 446, the court said: "Exception is taken to the fact that his Honor, the circuit judge, allowed the jury to disperse during the trial without cautioning them not to converse with any about the case. No request was made for such instructions, and such failure under the circumstances would not be reversible error. It is proper to say, however, that it is the duty of the court in all cases, but especially in cases of magnitude, or involving much feeling, to give such caution to the jury, and promptly punish a juror for violation of the instruction so given."

Where, upon the undisputed facts, no other verdict than the one returned could have been properly rendered, the appellate court will not examine an alleged error in allowing the jury to separate temporarily during the trial without being admonished by the trial court not to converse among themselves, or with others, upon the subject of the trial, as it is evident that no prejudice resulted there-

from. *Kirby v. Western U. Teleg. Co.* (1893) 4 S. D. 105, 439, 30 L.R.A. 612, 46 Am. St. Rep. 765, 55 N. W. 759.

III. Separation after submission of cause.

a. General rule.

It is the general rule that, in the absence of prejudice shown, the separation of the jury in a civil action after the cause has been submitted to them is not ground for setting the verdict aside.

Absences of one or two jurors.

Thus, in the absence of prejudice shown, the temporary absence of one juror from the others after the cause has been submitted is not ground for setting the verdict aside.

UNITED STATES.—*Burrill v. Phillips* (1812) 1 Gall. 360, Fed. Cas. No. 2,200.

CALIFORNIA.—*Re McKenna* (1904) 143 Cal. 580, 77 Pac. 461.

COLORADO.—*Bcals v. Cone* (1900) 27 Colo. 473, 62 Pac. 948, 20 Mor. Min. Rep. 591.

INDIANA.—*Alexander v. Dunn* (1854) 5 Ind. 122; *New Albany v. McCulloch* (1890) 127 Ind. 500, 26 N. E. 1074.

KANSAS.—*Perkins v. Ermel* (1864) 2 Kan. 325.

MAINE.—*Milo v. Gardiner* (1856) 41 Me. 551.

MASSACHUSETTS.—*Chemical Electric Light Co. v. Howard* (1890) 150 Mass. 495, 23 N. E. 317 (after agreement).

MINNESOTA.—*Eich v. Taylor* (1874) 20 Minn. 378, Gil. 330.

MISSISSIPPI.—*Graves v. Monet* (1846) 7 Smedes & M. 45.

NEVADA.—*Carnaghan v. Ward* (1872) 8 Nev. 30.

A new trial was refused when one of the jurors separated from the remaining eleven, after they had retired to deliberate of their verdict, without the permission of the court, and remained out of sight of the bailiff and the other jurors for one half hour. The court said: "Under the showing that he had no communication with any person upon the subject of the case which he was sworn to try, we think it cannot be inferred that his absence probably injured the appellant." *New Albany v. McCulloch* (1890) 127 Ind. 500, 26 N. E. 1074.

The court refused a new trial when one of the jurors, after they had retired, prevailed on the deputy sheriff to accompany him to the office of one of defendant's attorneys, to get an explanation of some matter connected with the case; that, on reaching the attorney's office, the juror said to him that there were one or two instructions the jury could not read, and requested the attorney to read them, but he instantly informed the juror it would be improper for him to say a word to the juror in reference to the case; that the

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jury must see the court in regard to such matters, and directed the officer and juror to return to the jury room. *Jones v. Warner* (1876) 81 Ill. 343.

That a juror after the cause was submitted went with the bailiff into another room and telephoned his employee was no ground for a new trial. *West Chicago Street R. Co. v. Lundahl* (1899) 183 Ill. 284, 55 N. E. 667.

The same was held where members of the jury left the room to telephone to their families. *Baizley v. Welsh* (1904) 71 N. J. L. 471, 60 Atl. 59.

Where, after submission of the cause, a juror went apart from the others but in the same room with a deputy sheriff and used the telephone, the court said: "The rule in this state, I take it to be, in civil cases, that a separation, against the instruction of the court, with evidence that improper influence might have been brought to bear upon the juror, puts the burden upon the party seeking to sustain the verdict to negative the presumption and show that no such attempt was made. I think that was done in this case. The brevity of the communication, the presence of the deputy who could hear what was said by the juror, and the affidavit of the juror, rebut the presumption of injury." *Saltzman v. Sunset Teleph. & Teleg. Co.* (1899) 125 Cal. 501, 58 Pac. 169.

Temporary separation of a sick juror from the others after submission of the cause is not fatal to the verdict. *Boggs v. Chicago & N. W. R. Co.* (1870) 29 Iowa, 577; *Spencer v. Johnson* (1915) 185 Mich. 85, 151 N. W. 684.

It was held to be no error that one of the jurymen, being very ill, was permitted by the court, during its adjournment, to leave the jury room for a short time, and retire to his lodgings; that upon the coming in of the court at the hour of adjournment, the remainder of the jury, by consent of parties, separated for the purpose of obtaining breakfast; that they then, with the absent jurymen, returned into court, and after receiving additional instructions retired to their room and found the verdict. But the court considered that there had been a waiver of any objection. *Parsons v. Huff* (1854) 38 Me. 139.

(That the court permitted a juror to attend a call of nature in charge of a constable is immaterial. *Watts v. South Bound R. Co.* (1901) 60 S. C. 67, 38 S. E. 240.)

So, the court refused to set aside the verdict because of the temporary absence of two of the jurymen after submission. *Henry v. Ricketts* (1809) 1 Cranch, C. C. 545; *Bledsoe v. Bledsoe* (1886) 8 Ky. L. Rep. 55, 1 S. W. 10; *Newell v. Ayer* (1850) 32 Me. 334; *Reed v. Chicago, B. & Q. R. Co.* (1915) 98 Neb. 19, 151 N. W. 936; *Smith v. Thompson* (1823) 1 Cow. 221.

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In *Ragland v. Wills* (1835) 6 Leigh, 1, the same was held where two jurors after agreement were for a short time separate from the others.

In *Edward Thompson Co. v. Gunderson* (1897) 10 S. D. 42, 71 N. W. 764, the court declined to set aside the verdict for separation of two jurors from the others after submission, when it affirmatively appeared that there was no prejudice, intimating that there was a presumption of prejudice.

General dispersal of jury.

It is the general rule that, in the absence of prejudice shown, the general separation of the jury in a civil action after the cause has been submitted to them is not ground for setting the verdict aside.

UNITED STATES.—*Liverpool & L. & G. Ins. Co. v. N. & M. Friedman Co.* (1904) 66 C. C. A. 543, 133 Fed. 713 (by leave of court); *Guardian F. Ins. Co. v. Central Glass Co.* (1912) 114 C. C. A. 639, 194 Fed. 851 (the same).

COLORADO.—*Dozenback v. Raymer* (1889) 13 Colo. 451, 22 Pac. 787 (by leave of court).

CONNECTICUT.—*Brandin v. Grannis* (1811) 1 Conn. 402, note.

ILLINOIS.—*Cleveland, C. C. & St. L. R. Co. v. Monaghan* (1892) 140 Ill. 474, 30 N. E. 369 (after agreement); *Lake Erie & W. R. Co. v. Helmerick* (1888) 29 Ill. App. 270 (by leave of court); *Madison Coal Co. v. Beam* (1895) 63 Ill. App. 178 (by leave of court); *De Haven v. United States Brewing Co.* (1910) 153 Ill. App. 126 (after agreement); *Yenne v. Centralia Coal Co.* (1911) 165 Ill. App. 603 (by leave of court).

INDIANA.—*Drummond v. Leslie* (1840) 5 Blackf. 453 (not necessary to decision); *Stutsman v. Barringer* (1861) 16 Ind. 363 (while on a view).

IOWA.—*Cook v. Wallers* (1856) 4 Iowa, 72 (after agreement); *Heiser v. Van Dyke* (1869) 27 Iowa, 359 (after agreement); *Walker v. Dailey* (1893) 87 Iowa, 375, 54 N. W. 344 (after agreement, by leave of court).

KANSAS.—*Morrow v. Saline County* (1879) 21 Kan. 484 (by leave of court).

KENTUCKY.—*Brown v. M'Connel* (1808) 1 Bibb (Ky.) 265 (after agreement); *Doe ex dem. Smith v. Harrow* (1814) 3 Bibb, 446 (the same).

LOUISIANA.—*Vicksburg, S. & P. R. Co. v. Elmore* (1894) 46 La. Ann. 1237, 15 So. 701.

MISSISSIPPI.—*James v. State* (1877) 55 Miss. 57, 30 Am. Rep. 496 (after agreement, but judgment reversed for refusal to poll jury).

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MISSOURI.—*Compton v. Arnold* (1873) 54 Mo. 149 (by leave of court).

NEW HAMPSHIRE.—*Nims v. Bigelow* (1862) 44 N. H. 376; *Evans v. Foss* (1870) 49 N. H. 490 (after agreement).

NEW YORK.—*Horton v. Horton* (1824) 2 Cow. 589 (after agreement); *Anthony v. Smith* (1859) 4 Bosw. 503; *Hager v. Hager* (1862) 38 Barb. 92.

NORTH CAROLINA.—*Butts v. Drake* (1799) 3 N. C. (2 Hayw.) 102 (after agreement).

OHIO.—*Wright v. Burchfield* (1827) 3 Ohio, 53 (after agreement); *Sutliff v. Gilbert* (1838) 8 Ohio, 405 (after agreement, case reversed on other grounds); *Armleder v. Lieberman* (1877) 33 Ohio St. 77, 31 Am. Rep. 530 (on an alarm of fire); *McFann v. Carlton* (1913) 17 Ohio C. C. N. S. 244 (by leave of court).

SOUTH CAROLINA.—*Sartor v. McJunkin* (1832) 42 S. C. L. (8 Rich.) 451 (after agreement); *Pulaski v. Ward* (1845) 31 S. C. L. (2 Rich.) 119 (obiter); *Welch v. Welch* (1855) 43 S. C. L. (9 Rich.) 133 (after agreement by leave of court).

TEXAS.—*Edrington v. Kiger* (1849) 4 Tex. 89; *Burns v. Paine* (1852) 8 Tex. 159.

VERMONT.—*Downer v. Baxter* (1857) 30 Vt. 467.

ENGLAND.—*St. John v. Abbot* (1735) Barnes, 441, 94 Eng. Reprint, 994; *FANSHAW v. KNOWLES* (herewith reported) *ante*, 25.

CANADA.—*O'Mullin v. Bishop* (1860) 20 U. C. Q. B. 275.

In *St. John v. Abbot*, *supra*, it is reported that "this cause was tried at the last Northampton assizes before Mr. Justice Reeve; and after the evidence was summed up in the forenoon, the jury retired to consider of their verdict. Before the rising of the court they came into court, attended by the bailiff, to ask a question, which was answered, and they were sent back. At the sitting of the court in the afternoon, the judge was informed that some of the jurymen (two or three) were in court; whereupon, being asked by him what they did there, answered they could not agree, and were thereupon sent back to their fellows; and afterwards a verdict was brought in for plaintiff. The judge did not certify the verdict to be contrary to evidence; the court was of opinion that this was a misbehavior in the jury, for which they are finable; but not a sufficient cause to set aside the verdict."

The general rule has been sustained in case of absences from the jury room of various jurors. *Walton v. Wild Goose Min. & Trading Co.* (1903) 60 C. C. A. 155, 123 Fed. 209, 22 Mor. Min. Rep. 688 (writ of certiorari denied, 194 U. S. 631, 48 L. ed. 1158); *Clark v. Cole* (1807) 2 N. J. L. 278; *Oram v. Bishop* (1830) 12 N. J. L. 153.

In *Carter v. Ford Plate Glass Co.* (1882) 85 Ind. 180, it was 10 B. R. C.

held that a brief absence of some of the jury immediately after the case has been submitted is immaterial.

In *James v. State* (1877) 55 Misc. 57, 30 Am. Rep. 496, *supra*, the court said: "The separation of the jury in this case did not vitiate the verdict. According to the old rule it would, but a sounder rule now prevails."

A statute requiring the jury to be kept together after the cause is submitted is merely directory. *Brandin v. Grannis* (1811) 1 Conn. 402, note; *Cook v. Watters* (1856) 4 Iowa, 71; *Heiser v. Van Dyke* (1869) 27 Iowa, 359; *McFann v. Carlton* (1913) 17 Ohio C. C. N. S. 244; *Downer v. Baxter* (1857) 30 Vt. 467.

A separation after agreement was held immaterial notwithstanding the statute declared that "after the cause is submitted they must be kept together, without drink, except water, and without food, except when otherwise directed by the court." *Cook v. Watters* (1856) 4 Iowa, 71; *Heiser v. Van Dyke* (1869) 27 Iowa, 359.

In *Brandin v. Grannis* (1811) 1 Conn. 402, note, the court refused to arrest judgment although the jury had separated after the cause was submitted, declaring it to be the uniform practice notwithstanding the statute stated that "when the court have committed any cause to the consideration of the jury, the jury shall be confined under the custody of an officer, appointed by the court, until they are agreed on a verdict."

For early Connecticut cases, *contra*, see *infra*, II. b.

b. Cases holding separations fatal.

The early Connecticut cases are opposed to the general rule. In *Lester v. Stanley* (1808) 3 Day, 287, the court remarked to the jury "that he understood it had sometimes been the practice with juries in this state to separate while they had a case under consideration." He stated in substance that the common law and the statute required them to be kept together, and said that, if they separated before they were agreed on a verdict and afterwards returned one, it would be set aside. And in *Howard v. Cobb* (1809) 3 Day, 309, it was said that judgment must have been arrested had it been proved that the jury separated before they had agreed upon a verdict.

In *Nicolls v. Whiting* (1711) 3 Day, 287, note, where the jury had broken loose from their confinement, the court refused to go on with the case and ordered a new trial (this case, of course, is not contrary to modern doctrine).

In Georgia the general rule is not followed. *Barfield v. Mullino* (1899) 107 Ga. 730, 33 S. E. 647; *Prescott v. Augusta* (1903) 118 10 B. R. C.

Ga. 549, 45 S. E. 431 (these cases are here included, although there was an attempt to seal the verdicts, as they show the general view).

In *Barfield v. Mullino*, *supra*, after the jury had retired to consider the case the hour arrived for the court to take the noon recess, and the court instructed the bailiff, without the knowledge or consent of the defendant or his counsel, that in case the jury agreed upon a verdict before the court reconvened they could return a sealed verdict at that hour. When court reconvened it appeared that the jury had agreed upon a verdict during the recess and had dispersed. Defendant's counsel objected to the reception of the verdict, and moved the court to declare a mistrial in the case. It was held error not to grant the motion.

Where the bailiff in charge of the jury, without the consent of the parties or their counsel, permitted the jury during a recess to seal their verdict and disperse, and, upon being informed that this action was unauthorized, reassembled the jury in their room, and upon the reconvening of the court the jury were brought in and the foreman delivered to the clerk what purported to be a sealed verdict, it was held to be error to refuse at this stage of the case to declare a mistrial. *Prescott v. Augusta*, *supra*. The court said: "We think this case is controlled in principle by the ruling in *Barfield v. Mullino*, *supra*. The ruling in *Barfield v. Mullino* was based upon the fact that after the jury had dispersed and mingled with the crowd, no matter for how short a space of time, the right to poll the jury was gone,—not the physical right to ask each individual juror composing the jury whether that was his verdict, but the right to ask these individuals while they constituted a legal jury, before they became again a mere part of the mass of the populace, whether the verdict rendered by them was their verdict. . . . This right is lost as soon as the jury have dispersed and cease to be a jury and the individuals become again simply members of the community."

It was held in *Robinson v. Donehoo* (1895) 97 Ga. 702, 25 S. E. 491, that "where, after a jury had been charged by the court and sent out to make up their verdict, two or three of them while separated from their fellows 'remained in conversation with somebody for about fifteen minutes,' the legal presumption is that the losing party in the case was thereby injured, and in the absence of any explanation of the matter there should be a new trial."

In *Moore v. Edmiston* (1874) 70 N. C. 471, the court declined to interfere with the discretion of the trial court in granting a new trial because the jury had separated after submission, stating that it "appears that the judge exercised a discretionary power only, which this court cannot revise, and, if it could, would say was properly exercised in this case."

So, where the court without consent allowed the jury to separate
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after submission, and for this reason set the verdict aside, its action was not reviewed. *Settee v. Charlotte Electric R. Co.* (1915) 170 N. C. 365, 86 S. E. 1050.

It was held in *Offit v. Vick* (1821) Walk. (Miss.) 99, that the separation of the jury after submission of the case was ground for a new trial. Compare *James v. State* (1877) 55 Miss. 57, 30 Am. Rep. 496, *supra*, II. b.

So, in *Stillwell v. Rennie* (1885) 11 Ont. App. Rep. 724, a new trial was granted where by leave of court the jury separated after the cause had been submitted to them.

In *Howle v. Dunn* (1829) 1 Leigh, 455, the trial court set the verdict aside where the jury separated after submission of the cause, and this decision was affirmed. (This case was doubted in *Bagland v. Wills* (1835) 6 Leigh, 1.)

Where a jury separates after falsely informing the custodian that they have sealed a verdict, a new trial may well be ordered. Thus the court considered that the misrepresentation gave ground for suspicion and a new trial was ordered when, after the jury had retired to consider of their verdict, without the consent of the appellant or the permission of the court, about the hour of 11 o'clock at night they agreed to return as a finding that they agreed to disagree, and they sealed up the same and disbanded, and did not meet again until the hour of 8 o'clock the next morning, when they destroyed the finding agreed upon and brought into court a general and special verdict against the appellant. *Short v. West* (1868) 30 Ind. 367.

So, where the jury falsely told the constable that they had sealed a verdict and separated, some of them going to a barroom where there was discussion of the case in their presence, and the next morning they were sent out again and found a verdict, it was afterwards set aside, as there was not only suspicion of abuse, but positive abuse. *Oliver v. First Presby. Church* (1826) 5 Cow. 283.

So, where jurors sealed a pretended verdict that they agreed to disagree and separated, a later verdict found by them was set aside. *Sawrel v. Bitterlee* (1893) 86 Wis. 420, 56 N. W. 1086.

A judgment was reversed, as it was held conduct not to be tolerated that "the jury, after they had retired to consider of their verdict, left the room, forcibly, and against the will of the constable; one of them actually absconded, and returned home to his own house; and two others were found in the public road, and could not be gotten to return, till they were actually seized, and taken back by the constable," in *Shepherd v. Baylor* (1820) 5 N. J. L. 827.

See also *Nicolls v. Whiting* (1711) 3 Day, 287, note, *supra*.

The absence of a juror after submission, with other irregularities
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or errors, may amount to sufficient grounds for a new trial. *Murphy v. Hindman* (1887) 37 Kan. 267, 15 Pac. 182.

Where the jury, during a view, drank beer with certain witnesses, and there was some separation of them, a new trial was ordered. *Burke v. McDonald* (1892) 3 Idaho, 296, 29 Pac. 98.

It may be here noted that judgment was reversed when "an attorney for the appellees, whom we must presume had knowledge of the fact that the jury were put in charge of an officer, and directed to remain together for the purpose of preventing improper influences reaching them, invites the officer to leave the presence of the jury, and go with him to his room, upon one occasion, at least, and then engages in plucking different members of the jury away from their fellows, and engages them in conversations which cannot be heard by persons 10 or 15 feet away, and in treating them with whisky, although at their solicitation." *Liverpool & L. & G. Ins. Co. v. Wright* (1915) 166 Ky. 159, 179 S. W. 49.

c. Where statute requires admonishment.

Where the statute requires admonishment on separation its omission is ground for a new trial. *Pracht v. Whittridge* (1890) 44 Kan. 710, 25 Pac. 192.

"Where a jury in a civil action separate and mingle with the public after they had retired to consider of their verdict, without permission of the court, and without having been duly admonished, as the statute requires, a presumption against their verdict arises that will vitiate it, unless it affirmatively appears that no prejudice was suffered by the losing party." *Ehrhard v. McKee* (1890) 44 Kan. 715, 25 Pac. 193.

But the admonition, if given in advance, need not be repeated immediately before the separation. *Fields v. Dewitt* (1905) 71 Kan. 676, 81 Pac. 467, 6 Ann. Cas. 349.

IV. Miscellaneous.

It may be noticed that the court said in *Iowa Sav. Bank v. Frink* (1901) 1 Neb. (Unof.) 14, 92 N. W. 916: "It appears from the record that after the case had been submitted to the jury, but before they had retired to consider their verdict, a portion of them were, by agreement of the parties, allowed to attend a caucus then being held in Pender, and that some of the jurors were upon the street and one of them went to his office and remained for some time; that those upon the street and the one who went to his office were not in charge of a sworn officer. Complaint is made of this, and it is one of the assignments of error, and was urged upon the district court upon a motion for a new trial. We have examined all
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the affidavits relating to this transaction that appear in the bill of exceptions, and it is nowhere shown that any prejudice resulted to the plaintiff from the irregularity complained of. None of the jurors talked about the case during the time, nor did third parties discuss the case in their presence or in the presence of any one of them. No prejudice resulting to the plaintiff, error cannot be predicated upon this assignment."

It may be noted that in *Brant ex dem. Buckbee v. Fowler* (1827) 7 Cow. 562, the setting aside of the verdict was for the drinking of liquor, not for the separation, and that the case was disapproved in *Wilson v. Abrahams* (1841) 1 Hill, 207.

Where the jury separate after agreement, the verdict not being reduced to writing, and thereafter one juror refuses to concur, the verdict cannot be recorded. *Lawrence v. Stearns* (1831) 11 Pick. 501. B. B. B.

[ENGLISH DIVISIONAL COURT.]

RE FLORENCE.

LYDALL v. HABERDASHERS' COMPANY.

87 L. J. Ch. N. S. 86.

Also Reported in 117 L. T. N. S. 701, 62 Sol. Jo. 87.

Will — Construction — Revocation of legacy — Effect upon residuary gift to legatee.

A bequest of residuary estate to be divided among certain charitable institutions to whom testator had previously given money legacies "in the proportions of their respective legacies" is not affected by a codicil by which testator revoked most of such legacies and in all other respects confirmed his will.

(October 31, 1917.)

ADJOURNED SUMMONS.

Henry Louis Florence, by his will dated November 20, 1909, bequeathed a large number of personal legacies and annuities, and then gave the following further pecuniary legacies: To the National Gallery, 10,000*l.*; to the Charing Cross Hospital, 10,000*l.*; to St. Bartholomew's Hospital, 10,000*l.*; to the British Museum, 1,000*l.*; and 1,000*l.* each to the following nine hospitals,—namely, the London Hospital, Westminster Hospital,
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St. Thomas's Hospital, Guy's Hospital, the Royal Free Hospital, Gray's Inn Road, the Great Northern Central Hospital, Holloway Road, the West London Hospital, the East London Hospital for Children, and the Poplar Hospital for Accidents, and also gave 1,000*l.* to the Architects' Benevolent Society. After giving certain specific legacies, the testator bequeathed 3,000*l.* to the Worshipful Company of Haberdashers upon certain conditions, and certain statuary and pictures to the National Gallery. He bequeathed to the trustees of the Victoria and Albert Museum, South Kensington, such of his remaining pictures and articles of art and *vertu* as they might select upon certain conditions, and, in the event of the said trustees being unable or unwilling to accept the said bequest, he gave the same right of selection from the same to the corporation of the city of London upon similar conditions, and, in the event of the said corporation being unable or unwilling to accept such bequest, he directed that the same should form part of his residuary estate. He devised and bequeathed all his residuary real and personal estate to his trustees upon trust for sale and conversion thereof, and for investment after payment thereof of the legacies, annuities, and duties, and for payment of the income of the investments to his brother, Ernest Bodinius Florence, for life, and after his brother's death the testator directed that one half of his residuary estate should be divided between "the following before-mentioned institutions in the proportions of their respective legacies,—namely, the National Gallery, Charing Cross Hospital, St. Bartholomew's Hospital, the British Museum, the London Hospital, the Westminster Hospital, St. Thomas's Hospital, Guy's Hospital, the Royal Free Hospital, the Great Northern Central Hospital, the West London Hospital, the East London Hospital for Children, and the Poplar Hospital for Accidents." He directed that the remaining half [87] of his residuary estate should be paid to Harry Shiel Elster Vanderpant for his absolute benefit.

By a codicil dated February 6, 1914, the testator revoked the absolute gift of one moiety of his residuary estate to H. S. E. Vanderpant, and directed his trustees to retain and hold the same upon trust to pay the income to H. S. E. Vanderpant for life, and after the death of H. S. E. Vanderpant he directed his trustees

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to stand possessed of the said moiety upon the like trusts and subject to the like powers and provisions as were declared and contained in his will of and concerning the other moiety of his residuary estate.

By a second codicil dated May 25, 1914, the testator revoked "the nine several legacies of 1,000*l.* each bequeathed by my will to the following hospitals,—namely, the London Hospital, Westminster Hospital, St. Thomas's Hospital, Guy's Hospital, the Royal Free Hospital, the Great Northern Central Hospital, the West London Hospital, the East London Hospital for Children, and the Poplar Hospital for Accidents," and also revoked the legacy of 1,000*l.* to the Architects' Benevolent Society, and continued: In all other respects I confirm my said will as altered by the said former codicil thereto."

The testator died on February 17, 1916, and his will and the two codicils thereto were duly proved.

In May, 1914, shortly before the execution of the second codicil the testator had made gifts of 1,000*l.* Corporation of London $3\frac{1}{2}$ per cent stock to each of seven of the nine hospitals whose legacies were revoked by that codicil,—the two hospitals to whom gifts were not made being the Westminster Hospital and the Poplar Hospital for Accidents,—and also made a similar gift to the Architects' Benevolent Society.

The value of the residuary estate was about 100,000*l.* The sole next of kin of the testator was his brother E. B. Florence, who had a life interest in the whole of the residuary estate. Questions arose as to the effect of the revocation of the legacies to the nine hospitals by the second codicil—(1) Whether or not there was thereby any express or implied revocation of the bequest to those hospitals of shares of the residuary estate, or whether such revocation in any way affected the bequest of the shares of residue; and (2) whether in the event of the nine hospitals not taking their respective shares of residue the whole residue was divisible between the other four institutions to whom shares in it were bequeathed, or whether the shares of the nine hospitals were undisposed of and passed to the next of kin.

The trustees issued an originating summons for the decision of these questions and other questions which arose in the construction
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tion of the will and in the administration of the estate. The other questions decided do not require a report.

J. W. N. Holmes, for the executors and trustees.

H. Terrell, K.C., and J. F. W. Galbraith, for the National Gallery and British Museum. The will and codicils must be read together and the residuary bequest construed accordingly. The revocation of the legacies to the nine hospitals leaves no legacies bequeathed to them on which a proportion for division of the residue can be fixed, and they take no shares in the residue. In *Courtauld, In Re; Courtauld v. Causton* (1882) 17 L. J. N. C. 142, [1882] W. N. 185, where residue was bequeathed to legatees *pro rata* in proportion to the amount of the legacies given to them by the will, and by a codicil two of the legacies were revoked, and legacies of increased amount given to the legatees, it was held that the legatees took shares of the residue proportionate to their increased legacies. The same principle applies here, and as, taking the will and codicils together, the nine hospitals take no legacies, they take no share in the residue. Legacies in the residuary bequest must mean effective legacies. The only effective legacies are those given to our clients and the two hospitals. The whole residue is disposed of, and they take the whole, and the next of kin is not entitled to the shares of the nine hospitals.

H. E. Wright, for St. Bartholomew's Hospital and Charing Cross [88] Hospital. Legacies in the residuary bequest must mean effective legacies, and those that have ceased to be effective must be disregarded. Or, to put it in another way, the present amount of the legacies which have been revoked is zero, and, in calculating the proportion, they must be taken as of no value, and therefore the effective legacies alone will come into the proportion. But those legacies form the whole proportions to be considered, and no part of the residue is undisposed of. The gifts to the seven hospitals made by the testator are extrinsic evidence of intention, and cannot be taken into consideration in construing the will.

Harman, for the nine hospitals. There is no revocation of the gift of shares of the residue. Where you have a distinct gift by
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a will the gift cannot be revoked except by equally clear and distinct words. See per Lord Cairns, L.C., in *Kellett v. Kellett* (1868) L. R. 3 H. L. 160, at p. 167. There is no such thing as an implied revocation. The codicil here confirms the will in all respects in which it had not been altered by the first codicil, and thereby it confirms the residuary bequest. The legacies are only mentioned as a convenient way in which the proportions in which the residue was to be divided might be defined, and the gift of the residue in no way depends upon such legacies being effective. The surrounding circumstances such as the gifts to the hospitals may be looked at in such a case as this.

Owen Thompson, for the sole next of kin. The respective legacies mean effective legacies. There is no express revocation of the legacies to the nine hospitals, and no increase of the proportions of the other four institutions, but there is nothing effective given to the nine. Their shares are undisposed of, and the nine fortieths of the residue which their legacies, if effective, would have given to them, pass to the next of kin.

H. Terrell, K.C., in reply. The effect of the confirmation of the will by the codicil is to bring the will down to the date of the codicil, and it takes effect as if it had been made with the alterations necessary through the dispositions of the codicils. See the judgment of the court of Appeal in *Fraser, In re; Lowther v. Fraser* [1904] 1 Ch. 726, 734, 73 L. J. Ch. N. S. 481, 484, 52 Week. Rep. 516, 91 L. T. N. S. 48, 20 Times L. R. 414. See also *Whiting, In re; Ormond v. De Launay* [1913] 2 Ch. 1, 82 L. J. Ch. N. S. 309, 108 L. T. N. S. 629, 57 Sol. Jo. 461. The effect of this is to eliminate the nine hospitals from the residuary gift.

Mathew, K.C., and **J. F. W. Galbraith**, for the Haberdashers' Company.

The Solicitor General (Sir Gordon Hewart, K.C.) and **Austen-Cartmell**, for the Board of Education.

A. F. C. Luxmoore, for the Corporation of London.

J. G. Wood, for H. S. E. Vanderpant.

L. Mossop, for another party.

Younger, J.: In this case the testator by his will gave to
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thirteen named charities and institutions, in ten cases the sum of 1,000*l.* each, and in three cases the sum of 10,000*l.* each, and with regard to the residue after the death of his brother, to whom he gave a life interest, he directed that "one half of my residuary estate shall be divided between the following before-mentioned institutions in the proportions of their respective legacies, namely," and then he names the thirteen institutions to which he had given pecuniary legacies in the earlier part of his will. So far, I think, there can be no doubt that the proportions in which these different institutions were to take in remainder this half of the testator's residue are clearly defined by reference to the respective amounts of what, at that moment, the testator doubtless treated as being effective legacies, if for no other reason than this,—that, until those legacies had been satisfied, there would be no sum at all available for the residuary legatees. Having so disposed of one half of his residue, the testator by his first codicil altered the trusts of his will with regard to the other half of his residue, and provided with regard to that other half, subject to another life interest, that it was to be dealt with and disposed of in the same way as the first half had been dealt with and disposed of by the will,—that is to say, it was to be divided in [89] the same proportions between the same thirteen legatees who were mentioned in the part of the will to which I have referred. Then we come to the second codicil, and it is that codicil which causes the difficulty, because thereby the testator revoked nine of the ten several legacies of 1,000*l.* each, "bequeathed by my will to the following hospitals;" and then he names nine of the ten institutions to which he had given 1,000*l.*, and then he revokes a legacy of 1,000*l.* bequeathed to the Architects' Benevolent Society, "and in all other respects I confirm my said will as altered by the said former codicil thereto."

Now, the effect of the revocation of those legacies given to the nine named hospitals was to deprive of what might be called effective legacies those nine hospitals mentioned in the codicil, and the question which has to be determined is, whether the residue which under the will and first codicil was divided in remainder amongst, with others, those nine legatees whose pecuniary legacies were so revoked, is also diverted from them by reason

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that they are no longer entitled to effective legacies under the will, because, as it is urged, it is only by reference to those legacies as effective legacies that the division of the residue is directed to be made. Now there is one point on which all are agreed. There is not in terms, nor is there by any necessary implication, judging from the terms of the second codicil alone, any revocation in that codicil of the gifts of residue which are given by the will and first codicil to those nine pecuniary legatees; those gifts remain unaffected by any revocation in the codicil. The question, therefore, which has to be determined is whether, there being no revocation in terms, there is still what is equivalent to a consequential revocation by reason of the expression which is used in the will, that the residue is to be divided amongst all the residuary legatees "in the proportions of their respective legacies," and not otherwise.

It was said on behalf of the other institutions interested in the residue—namely, those whose pecuniary legacies were not revoked—that, although you are still to divide the residue amongst the named legatees in accordance with their respective legacies, and although you must laboriously go through all the legatees for that purpose, nevertheless, when you have done so, if you find that nine of those legatees take no legacies at all, you must hold that they are entitled to nothing, so that in the result, although their interest in the residue apparently stands, you divide that residue, not amongst all the persons named, but amongst those of them only whose pecuniary legacies have not been taken away. Now no authority has been produced in support of the proposition that, for the purpose of the construction of a will as a whole, the effect of the revocation by a codicil of a pecuniary legacy thereby given is to strike out from the will the words by which the legacy is bestowed, as if they had never found a place there. The case of *Fraser, In re; Lowther v. Fraser* [1904] 1 Ch. 726, 73 L. J. Ch. N. S. 481, 52 Week. Rep. 516, 91 L. T. N. S. 48, 20 Times L. R. 414, does not go so far. On the other hand, there is ample authority for the proposition that the dispositions of a will are not to be disturbed more than is necessary to give effect to a revocation by codicil. The true result, therefore, seems to be that I am not to alter the residuary
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gift as to the terms in which it is given, and, if I can leave it intact without prejudicing the revocation in terms effected by the codicil, I ought to do so. Clearly, if a fair construction effecting that result can be found it ought to be preferred to one which would reduce to a nullity the expressed interests of so many beneficiaries. The question, therefore, is whether, upon a true and fair construction of this will, as altered by the second codicil, I can give to the expression "in the proportion of their respective legacies" such a meaning as will leave the residue of which the gift has not been revoked, to be distributed in accordance with what may be presumed to have been the testator's intention,—namely, to give to all the named residuary legatees something.

In my opinion, that result may be arrived at in one of two ways. It is, I think, permissible to construe this provision, that the residue is to be divided amongst legatees in the proportions of their respective legacies, as a provision which from the very beginning was inserted as a convenient way of showing the actual proportions, ten and one, or whatever they may have been, in which this [90] particular fund was to be divided between these particular institutions; or, again, one may arrive at the same conclusion by holding, as I think one may fairly hold, that "in the proportions of their respective legacies" means "in the proportions of their respective legacies as hereinbefore named,"—that is, altogether irrespective of whether the legacies were received or not, or were effective or not, because that contingency was not, in this connection, present to the testator's mind as a matter of any importance. If one attributes either of those two constructions to this residuary gift, one does give full effect to a disposition which, admittedly, has not been revoked, and one gives effect to it in such a way as to accord with what, as far as I can see, is the testator's expressed intention. It appears to me, therefore, balancing as best I can all the considerations on what is a very difficult point, and one on which there has been authority cited on both sides, that it is not unfair to read the words, "in the proportions of their respective legacies," in either of the ways I have mentioned, with the result that, although there has been a revocation of nine of the pecuniary legacies, the reason for which may, or may not, have been convincingly explained, there has been no

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revocation of anything else, and, accordingly, each of those thirteen named institutions will have apportioned to it the proportionate share of residue to which it would have been entitled if there had been by the codicil no revocation of the pecuniary legacies given to any of them.

Solicitors: *C. H. T. Wharton; Treasury Solicitor; Wilde, Moore, Wigston, & Sapte; Hanbury, Whitting, & Ingle; Crossman, Prichard, & Company; Eagleton & Sons; City Solicitor; Lydall & Sons; Foulger, Robinson, & Miller.*

Note.—Effect of revocation of specific bequests upon bequest of residue to legatees in proportion to their respective legacies.

Applying the rule that dispositions by will are not to be disturbed more than is necessary to give effect to a revocation by codicil, it will be observed that in the reported case (*RE FLORENCE, ante*, 48), it was held that a bequest of residuary estate to be divided among certain charitable institutions to whom testator had previously given money legacies, "in the proportions of their respective legacies," was not affected by a codicil by which testator revoked most of such legacies, and in all other respects confirmed his will.

A conclusion in accord with this decision has been reached in other cases involving similar facts.

Thus in *Colt v. Colt* (1865) 32 Conn. 422, where a testator bequeathed 500 shares in a company to his brother, and gave other shares of the stock to several other persons, and inserted a clause providing that all the remaining stock should be divided among the persons to whom he had given legacies of the stock in the ratio and proportion in which the legacies of stock were given, it was held that the residuary legacy to his brother was not revoked by a codicil stating that the testator revoked and canceled, for reasons growing out of his unbrotherly conduct, the legacy of 500 shares given to him, it being held that the language showed no intention to revoke the residuary legacy. The court said: "By our law every testator has a right to dispose of his property to whatever persons and for whatever lawful objects he may think proper. The instrument by which he may do it is called his will, because it is the expression of his intention. The leading inquiry in such cases always is, What was the intention of the testator? For whenever that can be ascertained it is to govern. To determine judicially this intention certain rules have been adopted by courts as aids in coming to a correct

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result. One of these rules is, that the construction is to be put upon the instrument as a whole, and not upon detached portions of it. So, if there is a codicil, that is to be read in connection with the will, and the construction is to be put upon the whole as one instrument. Another rule is, that the intention is to be inferred from the language used by the testator, explained, if necessary, by parol proof of such extrinsic circumstances as will throw light upon the meaning of the words used. The court is not at liberty to indulge in conjecture as to what the testator would have done if a particular subject had been brought to his attention, or as to what he may have supposed that he had done by the language used in his will. Another important rule is, that the different parts of a will, or of a will and codicil, shall be reconciled if possible, and where a bequest has been once made it shall not be considered revoked unless no other construction can be fairly put upon the language used by the testator. According to these well-settled rules, the bequest of a share of the residuary stock to James B. Colt has not been revoked. The language of the revocation is plainly limited to the first 500 shares. The words are, 'The legacy of 500 shares.' It would have been difficult to have used language more definite. The bequest of the residuary shares is in a different clause of the will, and has no reference to this clause except for the purpose of describing the legatees. If the last bequest had been in these words, 'I also give to my brother James B. Colt . . . shares of the residue of said stock,' it would have been difficult to have raised a question as to a revocation. But a particular legatee can be specified as well by describing him as already a legatee as in any other way. That the testator did not intend to revoke the residuary legacy may be inferred as well from what he did not say as from what he did. The specification of one item is always considered as implying the exclusion of others. If the testator had intended to cut off his brother entirely from any part of his property, it would have been much easier to have done it in express general terms, than to have made a specific revocation. He might have done, and naturally would have done, what in his second codicil he did do with reference to the children of James B. Colt. His language there is, 'I hereby give and bequeath to each of the children of James B. Colt a legacy of \$100, and I hereby cancel and wholly revoke any and all other legacies or devises by me at any time heretofore made to or for the use of and benefit of said children or any of them.' The court under the circumstances of this case refused to read the will and codicil as of the date of the codicil, saying: "They claim, in the first place, that it is a rule that a testator when he makes a codicil must be considered as bringing his whole will down to that time, and as speaking in his whole will as of that time. It is insisted,

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therefore, that this will and codicil ought to be read as of the date of the codicil, and hence after the execution of the codicil James B. Colt would not be a legatee of the 500 shares. The bequest of the residuary shares would not apply to him. This would be a strained application of the rule, admitting it to exist. There is no doubt that for certain purposes a will of personal estate would be considered as of the date of the last codicil. The execution of such an instrument implies that the will of the testator continues the same, except so far as the provisions of the will are revoked or modified. But this rule is of a limited character. If a testator should make a will giving to A a black horse, described as being then owned by him, and should ten years afterwards make a codicil, and in the mean time that horse should have died and another should have been obtained, it could not be claimed that the legacy would embrace the second horse. Yet, if the will must be considered as speaking at the time of the codicil, it would apply to it. But if the will should be read as of the date of the codicil it would not be of any avail to the respondents. It would not strike the clause containing the legacy of 500 shares out of the will. The effect would be merely to insert the codicil as the last clause in the will. The bequest of the residue of the stock, with the words, 'to be divided amongst the several persons to whom I have hereinbefore given legacies of stock,' would still have the same construction which we have given to it."

And holding the legacies independent, and not auxiliary, the court said: "The second rule on which the respondents rely is that, where one devise or bequest is made as auxiliary to a previous one, if the former is revoked the other falls with it. If a testator should devise a homestead to his son, and by a subsequent clause should devise a separate lot for the pasturage of the devisee's cows, a revocation of the devise of the homestead would revoke also that of the pasture lot, though not named. The rule is a correct one, but it has no application to these bequests. There is no connection between different shares of stock. There is no common use of them. They can be held with equal convenience separately or together. No case can be found where it has been held that a revocation of one devise operates as a revocation of another devise of merely the same kind of property. There would be no propriety in such a rule, and no reason for its adoption. It would be absurd to claim that if a testator should give a legatee \$2,000 in one clause of his will and should also give the same legatee a thousand dollars in another clause, an express specific revocation of the former would be an implied revocation of the latter. The implication arises solely from the dependence of one upon the other."

The decision in this case was reaffirmed in (1866) 33 Conn. 270.
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And the decision in *Colt v. Colt* (1864) 32 Conn. 422, was followed, and upon the same facts a like conclusion was reached, in *Colt v. Colt* (1881) 48 Fed. 385.

And in *Wetmore v. Parker* (1873) 52 N. Y. 450, where a testatrix gave a certain bequest of \$10,000 to an academy, and \$10,000 to a church for the erection of buildings, and after making other bequests added a clause bequeathing the residue of her estate to the persons, corporations, and societies to whom she had made bequests, in proportion to the amounts given them respectively, it was held that the residuary legacies to the academy and church were not revoked by codicils, one of which, after reciting the bequest to the academy, stated that she had given \$3,000 to the academy intending it to be in anticipation of so much of the former legacy, and that she bequeathed the academy \$7,000, instead of \$10,000, and the other of which, after stating that the testatrix's purpose in giving the legacy to the church was to aid it in erecting its edifice, stated that it appeared that this would soon be accomplished, and that she had concluded to give \$3,000 towards extinguishing the church's debt, and that she revoked the bequest of \$10,000 to the church. The court said: "The question is whether it was the intention of the testatrix, by these revocations, to deprive the Dutch Church of all share in the residuary estate, and to restrict the Female Academy to the proportion of the residue represented by \$7,000 instead of \$10,000. The primary object in construing wills is to ascertain and carry out the intention of the testator, and various rules have been adopted to accomplish this object. From the nature of the subject, these rules must be quite general, because no two wills can be found precisely alike in language and surrounding circumstances. It is a general rule that a codicil will not operate as a revocation beyond the clear import of its language. . . . Another rule is that an expressed intention to make an alteration in a will in one particular negatives, by implication, an intention to alter it in any other respect. *Quincy v. Rogers* (1852) 9 Cush. 296. It is always important to scrutinize with care the language employed not only in the particular parts, but in every part of the instrument, in order as far as practicable to ascertain the operation and intent of the mind using it. After a careful examination and considerable reflection, I have arrived at the conclusion that the two codicils do not operate to cut off or impair the right of the Academy or the Dutch Church to share in the residue under the 17th clause of the will. First, as to the Female Academy. The two bequests are not dependent. The reference to the first, in the last, designates the legatee and the amount, but as legacies they are independent. They are for different purposes,—one for particular, the other for general, purposes. We are justified in inferring that the testatrix had two

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objects in view,—one to aid in completing and furnishing the building, the other to contribute toward a fund for permanent support. The first bequest would necessarily be expended at once; the latter, might, and ordinarily would, be permanently invested. By the terms of the will the Female Academy was designated as a residuary legatee for an amount made certain by mere arithmetical calculation, as effectually as if the name and amount were written out. This is confessedly the legal construction and effect of the will. Was it changed by the testatrix? I think not. She paid \$3,000 upon the specific legacy in her lifetime, and revoked so much of it in language carefully confined to that alone. If she had intended to affect the other bequest, we are to presume that she would have said so. Her will and codicils bear evidence of particularity of expression as to every testamentary arrangement, and, within the rule referred to, the alteration of one bequest negatives an intent to alter the other. Suppose she had paid the whole \$10,000 while she lived. Would it tend to show an intent that the other should not take effect? So far from it, it would evince a continued testamentary friendship. The act of payment and revocation are one, and must be construed together; the latter was made to perpetuate evidence of the former. The reasons for revocation apply only to the specific legacies, showing that the testatrix regarded them independent. The right of the Dutch Church to the residuary legacy is substantially the same as that of the Academy, and for the same reasons.”

And in *Hard v. Ashley* (1890) 117 N. Y. 606, 23 N. E. 177, reversing (1889) 53 Hun, 112, 6 N. Y. Supp. 69, where a will contained a devise of a farm, and various bequests of money, and a clause giving the testator's residuary estate “to the same parties in the same ratio and proportion as are given and specified in the foregoing bequests,” and for the purpose of establishing proportions a value of \$15,000 was placed on the farm, it was held that the right of the person to whom the farm was devised to a share of the residuary estate was not defeated by a codicil executed by the testator in which he revoked the devise of the farm, and in lieu thereof gave the former devisee \$8,000, it being held that in reading the will, in place of the devise of the farm, valued at \$15,000, the gift of \$8,000 should be substituted in determining the proportion of the residuary estate to which the person was entitled. The court said: “This provision was held below to operate as a complete destruction of Mrs. Wilcox's right to share in the residue. It was there deemed to evidence a radical change of intention, and that, as the residuary bequest was dependent upon the preceding bequest, with the revocation of that particular bequest, the gift of a share of the residue fell. I cannot agree in that view, for it seems to me to deny effect and operation to a most important principle of construction in such

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cases. I refer to that which demands that a will and a codicil shall be taken and construed together, in connection with each other, as parts of one and the same instrument, and that the dispositions of a will shall not be disturbed further than to the extent necessary to give effect to the codicil. This has long been the settled rule upon which courts have acted. That principle derives its strength, however, not from authority so much, as from its own inherent force. The individual may execute any number of codicils, but all of the writings together constitute the will. The intent of the testator is then to be ascertained by a consideration of the whole, and the original testament is only affected, so far as there is any repugnancy in a codicil. A codicil is intended to add to, modify, or revoke, the prior will in the respects which may appear, and it cannot have any other operation than may be necessary to give effect to its provisions as the later expression of the testator's will. It follows that it could not operate as a revocation of previous testamentary dispositions; unless by some plain direction, or by force of the clear import of language in some inconsistent or repugnant provision. Here the clause of the codicil in question does not in terms revoke anything but the bequest of the farm; but it substitutes for that which is thus revoked a gift of a sum of money. The language 'in lieu and instead of said bequests' seems to me to be entitled to considerable significance, and to warrant our reading the original will without other change in that regard than the mere substitution of the gift of \$8,000 in money for the gift of the farm. The use of the words 'and her heirs' in the codicil, in connection with the gift of the money, should not be deemed to introduce any serious difficulty. By the will a farm was devised to Mrs. Wilcox for her life, and at her death 'to her children, then living, in equal shares.' It is very clear, from the reading of the codicil, which repeats that precise language, that the testator took and used the word 'heirs' in the sense of 'children,' and meant them to take the same interest in the substituted gift as they had in the gift which was revoked. The use of the word 'heirs' was unnecessary to an absolute gift of the money to Mrs. Wilcox, and everything points to its employment to cover the children as before; hence its technical purport must yield to the strong evidences of the testator's meaning. The disposition of the residuary estate by the testator was its division among those certain persons to whom legacies had been previously given, and in that proportion to each which the stated value of his or her legacy bore to the aggregate value of all of those legacies. The subsequent execution of a codicil only affected that disposition by lessening the amount of the legacy to Mrs. Wilcox from \$15,000 to \$8,000. That did not strike her out as one of the persons denominated by the residuary clause as a residuary legatee. It left her in; but in lieu

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of the farm gave her a sum of money representing less in value than the farm was valued at. This change, effected by the codicil, operated to introduce a new divisor in the distribution of the residuary estate. In other words, in reading the will we take in the codicil, and, in place of the gift in the second clause of a farm valued at \$15,000, we read a substituted gift of \$8,000, and the disposition of the residuary estate proceeds upon precisely the same principle. I think, in that way, the clear and obvious purpose of the testator is given effect. His will spoke from the time of his death, and then it was evidenced by the will and the codicil taken together. How is it affected by the codicil? He has not directed a revocation of the residuary disposition made by the will, and as that included Mrs. Wilcox, in order to revoke it as to her, we should have to say that a change by modification, through a codicil, of a bequest to her, which formed simply a measure of distribution of the residuary estate, operated to strike her out of the number of residuary legatees. That, in my opinion, is an impossible implication."

In *Quincy v. Rogers* (1852) 9 Cush. 291, where a testator gave legacies of \$2,000 to each of three persons and also gave each of them an equal share with certain others of his residuary estate, and subsequently executed a codicil in which he stated that his intention was not carried into effect by his will as to the three persons, and that he declared his will to be that \$6,000 should be taken by the three, or those of them who should survive him, they to share alike, and declared "this provision for said legatees to be in lieu of and as a substitute for that made in their behalf by the aforewritten will,"—and stated that he ratified the will in all other particulars, it was held that the residuary legacies to the three were not thereby revoked, but that the testator's intention was only to change his will with respect to the specific legacies to such persons. J. T. W.

[ONTARIO APPELLATE DIVISION.]

McGLYNN v. HASTIE.

44 Ont. L. Rep. 190.

Bills and notes — Transfer in exchange for goods — Effect.

Where an undorsed bill is given not in payment of a pre-existing debt, but by way of exchange for goods, the transaction is a sale of the bill by the party transferring it, and the purchase of the instrument, with all the risks, by the transferee.

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Payment — Acceptance of check of third person — Effect.

Where the seller of hogs accepted in payment therefor at the time of delivery the check of a third person for whom the purchaser said he was buying, the amount being filled in by the purchaser at the time, the transaction amounted to a barter of the check with all its risks, and the debt did not revive upon the check being dishonored.

Magee and Hodgins, JJ.A., dissenting.

(December 6, 1918.)

APPEAL by the defendant from the judgment of the judge of the County Court for the County of Huron, in favor of the plaintiff, in an action for \$200.10, the price of six hogs sold and delivered to the defendant and the expenses of protest of a cheque given in payment for the hogs, which cheque was dishonored.

The defendant alleged that in buying the hogs he was acting as agent for one Munro, and so informed the plaintiff, and that the plaintiff on the morning of the 18th October, 1917, accepted Munro's cheque, which was the dishonored cheque, as payment for the hogs.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A.

Charles Garrow, for the appellant, argued that Munro was the real purchaser of the hogs, to the knowledge of the plaintiff, and [191] that, even if the appellant was the original purchaser, what happened on the morning of the 18th October amounted to a novation by which Munro became the purchaser, and his cheque was accepted as payment by the plaintiff. Even if the findings of fact of the trial judge are accepted, the defendant is absolved from liability, as the transaction was primarily a sale of the cheque, there having been no pre-existing debt. Byles on Bills, 17th ed., pp. 181, 182, and the cases there cited of *Evans v. Whyte* (1829) 5 Bing. 485, 488, 130 Eng. Reprint, 1148, 3 More & P. 130, 7 L. J. C. P. 205; *Camidge v. Allenby* (1827) 6 Barn. & C. 373, 385, 108 Eng. Reprint, 489, 9 Dowl. & R. 391, 5 L. J. K. B. 95, 30 Revised Rep. 358, 21 Eng. Rul. Cas. 48; Roscoe's *Nisi Prius* Evidence, 18th ed. p. 699, where the *Camidge Case* is cited, and also *Fenn v. Harrison* (1790) 3 T. R. 757, 100 Eng. Reprint, 842. The onus was on the plaintiff to
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show that Munro, whose cheque was accepted, was not the real purchaser; and he had not done so.

William Proudfoot, K.C., for the plaintiff, the respondent, argued that the question at issue was purely one of fact, and having been found in favor of the plaintiff by the trial judge, his finding should not be disturbed. Counsel referred to Bowstead on Agency, 5th ed. p. 407, art. 120, and cases there cited.

Garrow, in reply, argued that the appellant should succeed even if the findings of the trial judge were accepted.

Maclaren, J.A.: The defendant appeals from a judgment of the County Court Judge of Huron condemning him to pay the plaintiff \$200.10 for six hogs, and the cost of protest of the cheque given in payment for them. The defendant claimed that he had bought the hogs as the agent of one Munro, and had so informed the plaintiff, and that the plaintiff accepted Munro's cheque in payment.

The evidence is that the defendant called at the plaintiff's house on the evening of the 17th October, 1917, and asked him if he had any hogs for sale. The plaintiff says that he answered that he "had four about ready." The defendant says that he told the plaintiff he was buying for a dealer named Munro, who was giving 17½ cents a pound, and was going to ship from the Gorrie station the following morning, and had given him blank cheques to fill up. The plaintiff says that Munro's name was not mentioned that evening. The defendant asked the plaintiff if he would bring his hogs to the station in the morning. The plaintiff says that his reply was: [192] "If it is a fine morning I will fetch them down" (it was raining that evening). In the morning the plaintiff brought to the station six hogs, which were weighed, and a slip was given him by the weigher, which he presented to the defendant, who filled up a blank cheque of Munro's drawn on the Dominion Bank of Wingham for \$198.50, and gave it to him.

The plaintiff admitted that he had, a few weeks previously, sold another lot of hogs to one Scott, another agent of Munro's, and received in payment a cheque of Munro's, filled up by Scott, which was honored.

A brother of the defendant swore that he was present when the

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plaintiff called to see his brother about the cheque, and that the plaintiff then admitted that the defendant had told him on the evening of the 17th that he was buying for Munro, and not for himself.

The trial judge, however, preferred the testimony of the plaintiff on this point, and I accept his finding.

He has further held that the sale was made on the evening of the 17th October. In this I am of opinion that he is clearly in error. The plaintiff's evidence is that he said he had about four hogs ready, and if the next morning was fine he would take them to the station. He himself says that he was under no obligation to take them, and he took six, instead of the four he had spoken of the previous evening, and they had to be weighed and delivered before the sale was complete. It is worthy of note that the solicitor of the plaintiff, in indorsing the particulars of his claim on the back of the writ of summons, gives the proper date of the sale, viz., the 18th October. The materiality of this question of date will presently appear.

The cheque was presented at the bank on the 19th October, and noted for nonpayment, and protested on the 20th. The defendant was advised of this within a reasonable time, so that no question of laches arises.

While the plaintiff denied that the name of Munro was mentioned on the previous evening, he noticed, when the defendant gave him the cheque, that it was signed by Munro, and not by the defendant, and he went away without saying anything about it. He, no doubt, was satisfied, as Munro's cheque, which he had received from Scott a few weeks previously, had been duly paid.

The authorities show that where a bill, note, or cheque is taken [193] for or on account of a pre-existing debt, the presumption is that it is only conditional payment, and if it is dishonored the debt revives; but, if it is given in exchange for goods or other securities sold at the time, the transaction amounts to a barter of the bill, with all its risks.

In *Fyde v. Clark* (1796) 1 Esp. 447, one of the earliest cases where this question arose, Lord Kenyon says (p. 448): "If, in the discount of the notes, he" (plaintiff) "took the bills and notes in question, he must be bound by it; the bankers parted

with them, supposing them to be good; he took them under the same impression. Having taken them without indorsement, he has taken the risk on himself."

In *Camidge v. Allenby* (1827) 6 Barn. & C. 373, at pp. 381, 382, 108 Eng. Reprint, 489, Bayley, J., says: "If the notes had been given to the plaintiff at the time when the corn was sold, he could have had no remedy upon them against the defendant. The plaintiff might have insisted upon payment in money. But if he consented to receive the notes as money, they would have been taken by him at his peril."

The law on the point is, in my opinion, correctly summed up in Byles on Bills, 17th ed. p. 182, where it says that where an undorsed bill is given "not in payment of a pre-existing debt, but by way of exchange for goods, . . . such a transaction has been repeatedly held to be a sale of the bill by the party transferring it, and a purchase of the instrument, with all risks, by the transferee."

See also Roscoe's *Nisi Prius Evidence*, 18th ed. p. 699, where it says: "A distinction has been drawn between the cases in which it" (a bill) "has been given in exchange for goods or other securities, sold at the time, and those in which it has been given in payment of a pre-existing debt. The former transactions amount, it is said, to a barter of the bill, with all its risks."

In my opinion, the judgment appealed from should be reversed and the action dismissed.

Meredith, C.J.O., and Ferguson, J.A., agreed with MacLaren, J.A.

Hodgins, J.A., dissenting: The contest is whether the appellant bought the hogs as agent for one Munro, and whether the respondent accepted Munro's cheque as payment.

[194] I have no doubt that there was no contract made on the evening of the 17th October, 1917. The appellant called on the respondent at his farm, and the evidence of both shows that, while the rate per pound was settled at 17½ cents, neither the number of hogs nor their weight nor their certain delivery was agreed upon. The matter was left in this way,—that the re-

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spondent had some hogs to sell, that about four were ready to go, and that if it was a fine morning he would bring them down to the station at Gorrie. There was no binding obligation to deliver entered into, and, if there had been, yet an act still required to be done in order to fix the price,—i. e., weighing. This shows that no contract existed previous to weighing and delivery next morning. *Logan v. Le Mesurier* (1847) 6 Moore, P. C. C. 116, 13 Eng. Reprint, 628, 11 Jur. 1091.

In the morning, six hogs, not four, were brought in, and the appellant was there to receive them. They were weighed by the station agent and put in the pens. The weight and price were written on the back of the weigh slip, and this was handed to the appellant by the respondent.

Upon the weighing and delivery and the consequent ascertainment of the price, the bargain for six hogs was for the first time a completed agreement, and the consideration became at once payable.

The trial judge has preferred the evidence of the respondent to that of the appellant upon the question of whether on the evening of the 17th October, 1917, the statement was made that Munro was purchasing the hogs. The respondent point blank denies that any reference to Munro was made that night or indeed that he knew him in the transaction till he saw the name on the cheque given in payment. The appellant, on the other hand, asserts that he told him that Munro was shipping at Gorrie in the morning at 17½ cents, and asked if he would like to fetch the hogs out, saying he had been over to Wingham and had got the blank cheques to pay the men in the morning.

There is nothing in the testimony that would suggest that the learned trial judge is wrong in adopting the version which he prefers. It must therefore be taken that the sale was made by the respondent to the appellant, not as agent, but as principal. I am not at all sure, after perusing the evidence, that the appellant was not simply picking up hogs on his own account, having some agreement [195] with Munro to take them at a price sufficient to pay for the appellant's time and trouble. But the finding I refer to puts an end to any such question. It also renders unimportant the difference between the respondent and the appellant.

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lant's brother as to the effect of a conversation between them relative to this point of disclosed agency.

Such being the case, then, upon the delivery into the pens, the price became payable by the appellant. Instead of paying cash, he filled up a blank cheque of Munro's, making it payable to the respondent, gave it to him, and he took it away with him. Nothing was said at the time by either party by way of comment or explanation.

On these facts, what is the effect of the giving and receiving of a cheque signed by Munro instead of one signed by the appellant?

If it had been the appellant's own cheque, it would be a conditional payment, and the right of action for the purchase money would be suspended, but on the dishonor of the cheque would have revived. *Cohen v. Hale* (1878) 3 Q. B. D. 371, 47 L. J. Q. B. N. S. 496, 39 L. T. N. S. 35, 26 Week. Rep. 680.

The case of *Belshaw v. Bush* (1851) 11 C. B. 191, 138 Eng. Reprint, 444, forms a good starting point for ascertaining how far that principle applies where the cheque is that of a third person. There the plaintiff drew a bill upon a third party, William Bush, for part of the debt of the defendant. Maule, J., who delivered the judgment of the court, said what follows, at pp. 206, 207: "If a bill given by the defendant himself on account of the debt operate as a conditional payment, and so be of the same force as an absolute payment by the defendant, if the condition by which it is to be defeated has not arisen, there seems no reason why a bill given by a stranger for and on account of the debt should not operate as a conditional payment by the stranger; and, if it have that operation, the plea in the present case will have the same effect as if it had alleged that the money was paid by William Bush for and on account of the debt. But, if a stranger give money in payment, absolute or conditional, of the debt of another, and the causes of action in respect of it, it must be a payment on behalf of that other, against whom alone the causes of action exist, and, if adopted by him, will operate as payment by himself."

In 1858 this decision was followed in *Bottomley v. Nuttall*, 5 C. B. N. S. 122, 141 Eng. Reprint, 48. It was there decided that
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drawing a bill of [196] exchange on one partner did not show an election to trust him and to release the firm,—nor did the making out of invoices in his name.

Williams, J., said (p. 144): "If the creditor accepts a bill or note for and on account of the debt, that operates as a conditional payment. . . . If the bill has been returned to the creditor unpaid, without any laches on his part, the condition which was to defeat the payment has happened, and consequently it is no payment."

Crowder, J., agreed with Williams, J. Byles, J., said that taking a bill for and on account of the debt does not operate as an absolute discharge of the debt. It is at most a conditional payment.

In *Hopkins v. Ware* (1869) L. R. 4 Ex. 268, the plaintiff lent 250*l.* to one Ware. After his death, the solicitor of the executor of Ware sent the plaintiff his own cheque for 258*l.*, the amount due. The solicitor's cheque was dishonored, and the trial judge found for the plaintiff. On appeal the court were of opinion that the plaintiff, by laches, had lost the chance of payment and could not recover from the estate. Channell, B. (pp. 271, 272), says: "Certainly when the cheque was remitted it did not operate as payment; it only did so, if at all, on the duty to present in reasonable time being neglected."

The case of *Currie v. Misa* (1875) L. R. 10 Ex. 153, 4 Eng. Rul. Cas. 317, *Misa v. Currie* (1876) 1 App. Cas. 554, is of importance here because the majority of the Court of Exchequer Chamber point out that the true reason, as given by the court in *Belshaw v. Bush* (1851) 11 C. B. 191, 138 Eng. Reprint, 444, 22 L. J. C. P. N. S. 24, 17 Jur. 67, and upon which its judgment is founded, is that a negotiable security given on account of a pre-existing debt is a conditional payment of the debt, the condition being that the debt revives if the security is not realized (p. 163). They then go on to add (p. 164) that "the doctrine is as applicable to one species of negotiable security as to another; to a cheque payable on demand, as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person."

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The question involved in *Currie v. Misa* arose on the giving of a cheque, and the argument proceeded on the assumption that while, if a negotiable security payable at a future day had been given, the element of time during which suspension of the remedy would operate formed the consideration, the same result could not follow in case of a cheque which was payable on demand.

[197] I find that in cases earlier than *Belshaw v. Bush*, the giving of a negotiable instrument made or drawn by a third party has been considered as equivalent to the giving of such an instrument by the debtor.

The view held by Mr. Justice Maclaren in his work on Bills, Notes, and Cheques, 5th ed. p. 368, is shown in the following passage, where the learned author draws his conclusion from *Currie v. Misa* and *Maxwell v. Deare* (1853) 8 Moore, P. C. C. 363, 14 Eng. Reprint, 138: "A creditor is not bound to take a bill, note, or cheque in payment of a debt; and if he does so it operates only as a conditional payment, unless he expressly agrees to take it in absolute payment, or unless there are special circumstances from which such an agreement may be implied."

See also Falconbridge on Banking and Bills of Exchange, 2d ed. pp. 569, 570 et seq.; Roscoe's Nisi Prius, 18th ed. p. 700; Byles, 17th ed. p. 183; Chalmers on Bills of Exchange, 7th ed. pp. 338, 242.

Belshaw v. Bush has been followed in *Keay v. Fenwick* (1876) 1 C. P. D. 745 (C. A.); *In re a Debtor* [1908] 1 K. B. 344, 77 L. J. K. B. N. S. 409, 98 L. T. N. S. 652, 52 Sol. Jo. 174, 15 Manson, 1; *In re J. Defries & Sons Limited* [1909] 2 Ch. 423, 78 L. J. Ch. N. S. 720, 101 L. T. N. S. 486, 25 Times L. R. 752, 53 Sol. Jo. 697.

It may be interesting to note that, earlier than 1851, the question had arisen in at least four cases where promissory notes or bills of exchange of a third person had been taken by the creditor. These are *Stedman v. Gooch* (1793) 1 Esp. 3; *Kearslake v. Morgan* (1794) 5 T. R. 513, 101 Eng. Reprint, 289; *Camidge v. Allenby* (1827) 6 Barn. & C. 373, 108 Eng. Reprint, 489, 9 Dowl. & R. 391, 5 L. J. K. B. 95, 30 Revised Rep. 358, 21 Eng. Rul. Cas. 48; *Goodwin v. Coates* (1832) 1 Moody & R. 221; and in each case the plaintiff had judgment.

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These cases, as well as *Currie v. Misa*, are discussed by my brother Biddell in *Freeman v. Canadian Guardian Life Insurance Co.* (1908) 17 Ont. L. Rep. 296.

The only remaining question on this branch of the case is whether a cheque under our law stands in the same position as in the English cases. I think it is clear from our Bills of Exchange Act, R. S. C. 1906, chap. 119, § 53, and § 165, that a cheque, for the purposes of this case, must be treated as a negotiable instrument within the decisions which have been already cited.

Section 53, in providing that valuable consideration may be constituted by an antecedent debt or liability, says that such a [198] debt or liability is so considered "whether the bill is payable on demand or at a future time."

By § 165, a cheque is a bill of exchange drawn on a bank payable on demand, and, except as otherwise provided in part III. of the Bills of Exchange Act, the provisions of the act applicable to a bill of exchange payable on demand apply to a cheque. The exceptions may be found in Maclaren on Bills, Notes, and Cheques, 5th ed. p. 425, and do not affect the question. See *M'Lean v. Clydesdale Banking Co.* (1883) 9 App. Cas. 95, 50 L. T. N. S. 457; *Trunkfield v. Proctor* (1901) 2 Ont. L. Rep. 326.

Looking at the facts of this case, I think the situation may be described in the words of Sir John Jervis in *Maxwell v. Deare* (1853) 8 Moore, P. C. C. 363, 377, 14 Eng. Reprint, 138: "The object was to substitute a bill of exchange for a cash payment as a mode of payment, but only to be considered so if the bill was duly honored at maturity."

The law applicable to the case is that where a negotiable instrument, including a cheque either of the debtor or a third party, is taken for an antecedent debt of the debtor, it is, unless special circumstances intervene, only conditional payment, and that, unless the receiver of it is guilty of laches, he can, upon nonpayment of the security, look to his original purchaser.

What, then, is the evidence on the question of diligence or laches on the part of the plaintiff? The cheque in question is dated the 18th October, 1917, and is drawn on the Dominion Bank, Wingham. The respondent deposited it to his credit in the
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Bank of Hamilton in Wroxeter on the same day, and it reached the branch of that bank at Wingham on the 19th October. It was noted for nonpayment also on the 19th and protested on the 20th October, 1917. The respondent learned of this on the 22d, and at once called up the appellant's house. In his absence he left a message with the appellant's wife that Munro's cheque was protested, and was told by her to go and see Fells in Wingham. Fells was a partner of Munro. The respondent did not go, but he heard, shortly after, from the appellant by telephone, and discussed the matter with him. The appellant promised to see Munro and communicate with the respondent, but did not do so, and the respondent then went to see him without any result. No laches is shown, and the cheque is produced from the respondent's custody. The right of [199] the respondent to sue the appellant has not been lost, and he is entitled to recover the amount sued for.

The appeal should be dismissed.

Since writing the above, I have had the advantage of reading the judgment of my brother Maclaren. While unable to agree with its conclusions, yet, on account of his authority upon questions of this nature, I feel I must venture to set out my reasons notwithstanding the small amount at stake.

I cannot bring myself to regard the transaction as a barter, or as the purchase of a negotiable security. The cheque was, until the moment before it was handed over, an incomplete instrument. *Hogarth v. Latham & Co.* (1878) 3 Q. B. D. 643, 47 L. J. Q. B. N. S. 339, 39 L. T. N. S. 75, 26 Week. Rep. 388. The appellant was, therefore, not the holder of a security which he desired to sell, and it was not until after the delivery and weighing was complete, and the sale of the hogs made, that the cheque became a valuable security.

To decide that, without a word being said, the respondent at that moment of time bought the cheque as a bill of exchange, and lost his right to be paid for the hogs if Munro had not enough money in the bank, is to go much further than I think the real transaction warrants. It is a question of intention, and therefore of fact, as is pointed out in Chalmers, 7th ed. p. 342.

I think there was an antecedent debt; for, as Lord Campbell
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observes in *Timmins v. Gibbins* (1852) 19 Q. B. 722, 726, 118 Eng. Reprint, 273, "in fact it is difficult to say that there can be any case in which the debt is not antecedent to the payment. Even where the money is paid over the counter at the time of the sale, there must be a moment of time during which the purchaser is indebted to the vendor."

Fydeell v. Clark, cited by my learned brother, relates to undorsed bills and notes given by a bank two years before to a customer for the proceeds of promissory notes for 8,000*l.*, and the action was by the customer's former partner, asserting liability in the bank to pay the value in cash of those securities, which proved worthless. It was properly held that the customer must have long since agreed to take the securities in the place of cash.

The case of *Camidge v. Allenby* was one of what were known as county bank notes. Its effect is set out in the following quotation from Halsbury's Laws of England, vol. 1, pp. 574, 575: [200] "If a bank note be given in payment for value received at the time, the payment is complete, and in the event of dishonor of the note no recourse can be had against the transferrer either on the note or the consideration for it (*Camidge v. Allenby* (1827) 6 Barn. & C. 373, 108 Eng. Reprint, 489, 9 Dowl. & R. 391, 5 L. J. K. B. 95, 30 Revised Rep. 358, 21 Eng. Rul. Cas. 48). But a note given for a pre-existing debt has been held to be only payment conditional on its being paid when presented. A note, however, must be presented or circulated within a reasonable time, otherwise, in the event of the bank failing, the loss will fall on the transferee. And in the event of the bank failing, or the note being dishonored, the transferee, in order to preserve his right as against the transferrer, must give him notice and offer to return the note."

It is also treated in the same way by Roscoe and by Byles, in the last editions of their works, where the decision is limited to bills or notes payable to bearer. Bramwell, B., in *Guardians of Lichfield Union v. Greene* (1857) 1 Hurlst. & N. 884, 156 Eng. Reprint, 1459, deals with it as if confined to bank notes.

In Roscoe's *Nisi Prius*, 18th ed. p. 699, this statement is made: "If a bill or note payable to bearer be delivered without
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indorsement, a distinction has been drawn between the cases in which it has been given in exchange for goods or other securities, sold at the time, and those in which it has been given in payment of a pre-existing debt. The former transactions amount, it is said, to a barter of the bill, with all its risks. *Fenn v. Harrison* (1790) 3 T. R. 757, 759, 100 Eng. Reprint, 842; *Ex parte Shuttleworth* (1797) 3 Ves. Jr. 368, 30 Eng. Reprint, 1057; *Camidge v. Allenby* (1827) 6 Barn. & C. 373, 381, 108 Eng. Reprint, 489, 9 Dowl. & R. 391, 5 L. J. K. B. 95, 30 Revised Rep. 338, 21 Eng. Rul. Cas. 48. But when the security is delivered in payment of a pre-existing debt, the delivery does not operate as payment, unless the transferee makes the security his own by laches."

Byles on Bills, 17th ed. p. 182, puts it thus: "If a bill or note, made or become payable to bearer, be delivered without indorsement, not in payment of a pre-existing debt, but by way of exchange for goods, for other bills or notes, or for money transferred to the party delivering the bill at the same time, such a transaction has been repeatedly held to be a sale of the bill by the party transferring it, and a purchase of the instrument, with all risks, by the transferee."

No doubt the statement by Bayley, J., if read as applying generally to all negotiable instruments, may bear the construction [201] given to it. If so treated it would be inconsistent with *Currie v. Misa*, *supra*. But such a wide interpretation was not necessary to the decision, and I do not think that all the learned judge's remarks have been treated by the text-writers as authoritative, or as expressing the judgment of the court.

Park, J., at about the same time, in *Evans v. Whyte* (1829) 5 Bing. 485, 488, 130 Eng. Reprint, 1148, 3 Moore & P. 130, 7 L. J. C. P. 205, said: "If a party sells goods, and takes for them a bill of exchange which is not honored, he is remitted to his original consideration."

In Halsbury's Laws of England the sale or transfer of a bill is spoken of in vol. 2, pp. 521, 522, in this way: "A transferrer by delivery is in effect the vendor of an instrument precisely as he might be the vendor of any other chattel. Beyond the actual points in regard to it which he warrants he is in no way responsible for the value of what he sells. If, therefore, its value di-

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minishes or even vanishes altogether, *e. g.*, through the bankruptcy of any of the parties to it, he is not bound to compensate the transferee for his consequent loss (*Fyddell v. Clark* (1796) 1 Esp. 447, 448). Where, on the other hand, the instrument is transferred, not by way of sale, but in payment of a debt, the transferer is liable on the consideration unless the instrument was taken in absolute satisfaction of the debt. *Camidge v. Allenby* (1827) 6 Barn. & C. 373, 108 Eng. Reprint, 489, 9 Dowl. & R. 391, 5 L. J. K. B. 95, 30 Revised Rep. 358, 21 Eng. Rul. Cas. 48."

And in vol. 7, pp. 447, 448, the general rule is thus stated: "A creditor is not bound to accept payment of a debt otherwise than in current coin, or, in the case of a debt exceeding 5*l.*, in notes of the Bank of England, and if he takes a bill, note, or cheque in payment, he may either accept it in satisfaction of the debt, in which case he takes the risk of its being dishonored, or may accept it as a conditional payment only, the effect of which is to suspend his remedies during the currency of the instrument. The presumption, in the absence of a clear indication of a contrary intention, is that payment by means of a bill, note, or cheque is a conditional payment only. If the security is paid when it becomes due, this is equivalent to payment of the original debt; and if it is paid in part, the original debt is discharged *pro tanto*. If the instrument is dishonored, payment of the original debt may be enforced as if no security has been taken, unless the bill has been negotiated and is outstanding at the time of action brought in the hands of a third party, in which case the creditor's remedy continues to be suspended."

I cannot find, in the evidence in this case, any clear indication that the cheque of Munro, when it became a completed instrument, was, without a word being said, purchased *eo instanti* by the respondent, and prefer to rest my conclusion upon the proposition as above laid down.

Magee, J.A., agreed with **Hodgins, J.A.**

Appeal allowed (**Magee and Hodgins, JJ.A.**, dissenting).

Note.—Check of third person, or bank draft made payable to a creditor to whom it is delivered by the debtor, as a payment of the debt.

I. Majority rule:

- a. *In general*, 76.
- b. *Cashier's checks*, 76.
- c. *Bank drafts*, 77.
- d. *Effect of special circumstances*, 78.
- e. *Necessity of diligence on part of creditor*, 79.

II. Minority rule, 79.

I. Majority rule.

a. In general.

The general rule that the taking of commercial paper operates only as conditional payment unless there is an agreement that it shall operate as absolute payment has been applied where the check involved was that of a third person and was made payable to the creditor directly. *Smith v. Bankers Engineering Co.* (1914) 186 Ill. App. 115; *Manitoba Mortg. & Invest. Co. v. Weiss* (1904) 18 S. D. 459, 112 Am. St. Rep. 799, 101 N. W. 37, 5 Ann. Cas. 868. In *Marrett v. Brackett* (1872) 60 Me. 524, a check given by a third person, to whom a debtor had sent money to pay his debt, to creditors, was held not payment, where the creditors acknowledged receipt of check, but did not deliver up note or receipt their account. It is stated in *Okie v. Spencer* (1837) 2 Whart. 253, 30 Am. Dec. 251, that the check of a firm of which the maker of a note is a member, given to the holder of the note, cannot be considered as having been taken in satisfaction of the note, nor as having extinguished it. In *Olcott v. Rathbone* (1830) 5 Wend. 490, the acceptance by the holder of a note of a check of a third party for a part of the amount of the note, and a new note for the balance, was held not to be a payment of the original note, but that, upon dishonor of the check, an action might be maintained on the original note against the maker to recover the amount of the check. It does not appear to whom the check was made payable.

The fact that the creditor gives a receipt acknowledging payment does not change the rule. *Weaver v. Nixon* (1882) 69 Ga. 699; *National L. Ins. Co. v. Goble* (1897) 51 Neb. 5, 70 N. W. 503.

But see *MacMahon v. United States L. Ins. Co.* (1904) 68 L.R.A. 87, 63 C. C. A. 130, 128 Fed. 388, *infra*.

b. Cashier's checks.

This rule has been applied where the instrument was a cashier's
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check, and it has been held that the acceptance of such a check for a pre-existing debt is a conditional, not an absolute, payment. *Cannonsburgh Iron Co. v. Union Nat. Bank* (1886) 3 Sadler (Pa.) 46, 6 Atl. 574. In this case the maker of a note delivered to the holder a cashier's check payable to the holder, who received it and delivered to the maker his promissory note. In holding that this amounted to a conditional payment only, the court states that "the check was taken for a pre-existing debt. The case stated does not aver any agreement that it was to be accepted as an absolute payment. The burden of proof was on the maker of the note to overthrow the presumption that the check was taken as a conditional payment. It was of no higher character than the note, and it certainly was not money."

It was held in *Dille v. White* (1906) 132 Iowa, 327, 10 L.R.A. (N.S.) 510, 109 N. W. 909, that one receiving cashier's checks to transfer money loaned to him does not accept the risk of the insolvency of the bank by exchanging them for drafts, where the lender applied for and thought they were drafts and they were delivered to the borrower on the assumption that they were such.

c. Bank drafts.

And the rule has been applied also in case of bank drafts, there being held to be a conditional payment only. *Globe Exp. Co. v. Taylor* (1916) 61 Colo. 430, 158 Pac. 717; *Weaver v. Nixon* (1882) 69 Ga. 699; *National L. Ins. Co. v. Goble* (1897) 51 Neb. 5, 70 N. W. 503. The acceptance by the seller of cattle of bank drafts indorsed to him by the bank's teller, to whom the drafts were made payable, does not amount to a payment of the purchase price of the cattle in the absence of an express agreement to that effect. There is no presumption of payment in such case. *Darnall v. Morehouse* (1869) 36 How. Pr. 511. In this case, when the drafts were handed to the seller, he requested the purchaser of the cattle to put his name on them and that was done. The court states that if there is a presumption of payment from the acceptance of the draft of the third person, the facts in the case at bar rebut the presumption and show that the draft was not taken at the risk of the vendor and in absolute payment. A bank draft accepted by an express agent who thereupon delivered a bill of lading with draft attached to the consignee of goods does not amount to payment where the drawer of the draft failed before it could be presented for payment. *Globe Exp. Co. v. Taylor* (1916) 61 Colo. 430, 158 Pac. 717. A draft by one bank upon another, payable upon presentation and without grace, was held to be conditional payment only of the original debt, in *Weddigen v. Boston Elastic Fabric Co.* (1868) 100 Mass. 10 B. R. C.

422. Whether the draft in this case was payable to the creditor is not disclosed in the opinion.

See *Dille v. White* (1906) 132 Iowa, 327, 10 L.R.A.(N.S.) 510, 109 N. W. 909, *supra*.

d. Effect of special circumstances.

This general rule has been conceded, but circumstances showing a contrary intention have been relied on in some cases. In *Briggs v. Holmes* (1888) 118 Pa. 283, 4 Am. St. Rep. 597, 12 Atl. 355, the drawee of a draft paid the same by a cashier's check payable to the holder of the draft. It was conceded by the drawee that the giving of a third person's check without more is not necessarily payment of the debt for which it is received, and that in the absence of any agreement, express or implied, the presumption is that it is only conditional payment, but that such presumption may be rebutted by circumstances tending to show the contrary; and it was claimed that the contrary was shown by a course of dealing between the parties in which the holder of the draft in question had been collecting drafts against the drawee for a number of years and had always received cashiers' checks; that this course of dealing had been pursued in accordance with the instruction of the holder. The court held that under these circumstances a question of fact was raised for the jury. Upon a second appeal of this case reported in (1889) 131 Pa. 233, 17 Am. St. Rep. 804, 18 Atl. 928, the court affirmed a judgment for the plaintiff upon the verdict of the jury that the check was accepted, not as absolute but as conditional payment of the draft. Upon the second appeal the court states that "nothing is better settled than that, in the absence of any special agreement to the contrary, the mere acceptance by a creditor from his debtor of the note or check of a third person to the creditor's order for a pre-existing indebtedness is not absolute but merely conditional payment, defeasible on the dishonor or nonpayment of the note or check, and in that event the debtor remains liable for his original debt." From the report of the case of *Campbell v. Heaslip* (1888) 6 Manitoba L. R. 64, it is not clear whether the check of a third person was payable directly to the creditor. Upon the dishonor of the check, the amount thereof was charged back to the debtor, who made no objection thereto, and it was held that the conduct of the party showed that the check had not been received as payment.

A check of a third person, made payable to a purchaser of real estate and indorsed to the broker by him, was held to be payment of the broker's commission so as to preclude an action against the vendor upon dishonor of the check, where upon the closing of the sale the vendor was advised that the broker had applied the check on commissions. *Fleischman v. Bishop* (1919) 174 N. Y. Supp. 142. 10 B. R. C.

c. Necessity of diligence on part of creditor.

The creditor must use due diligence in collecting the check; failure to do so makes the payment absolute. It has been held that the acceptance of a check of a third party implies an undertaking of due diligence in presenting the check for payment, and that, in case of loss through want of due diligence, such acceptance will be held to operate as payment. *Kraetsch v. Chicago* (1916) 198 Ill. App. 395. In this case the failure of a city to collect a check on a bank in the city for about three weeks was held to make the acceptance of the check operate as payment. The check in this case was a cashier's check and made payable to the city collector in payment of a saloon license. In *Kilpatrick v. Home Bldg. & L. Asso.* (1888) 119 Pa. 30, 12 Atl. 754, it is stated to be "well settled that in the absence of an agreement to the contrary a check or promissory note of either the debtor or a third person, received for a debt, is merely conditional payment, that is, satisfaction of the debt if and when paid." It is held in this case that the acceptance of such a check implies an undertaking of diligence in presenting it for payment, that the holding of the check for three months is not due diligence, and the loss falls on the creditor. The holding by the creditor of a check from the fourth until the ninth day of the month before presenting it for payment is such negligence as in law converts the provisional payment into an absolute one. *Manitoba Mortg. & Invest. Co. v. Weiss* (1904) 18 S. D. 459, 112 Am. St. Rep. 799, 101 N. W. 37, 5 Ann. Cas. 868. That the creditor is under no obligation to receive the check of a third person payable to his own order is held in *Curtis & Co. Mfg. Co. v. Douglass* (1890) 79 Tex. 167, 15 S. W. 154, but it was further held there that if he does receive it, he is under obligation to use diligence to collect it. His failure to use such diligence converts the provisional payment into an absolute one. Payment was held to be absolute in *Sawyer v. Thomas* (1890) 18 Ont. App. Rep. 129, where the creditor, instead of notifying the debtor upon the dishonor of the check, entered into correspondence with the drawers of the check, promising to hold it over for a short time, and waited a week before writing to their debtor. The check involved in this case was one issued by a private banker. The retention by the payee of a note of a draft sent in payment of the note for over six months, without refusing to accept it as payment, was held to amount to payment in *Conde v. Dreisam Gold Min. & Mill. Co.* (1906) 3 Cal. App. 583, 86 Pac. 825, but in this case the draft was good.

II. Minority rule.

There is some support for the theory that there is a presumption
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of payment from the receipt of the check of a third person or a bank draft payable directly to the creditor; at least in several cases it has been held upon the facts that there is such a presumption. Thus, where the purchaser of a bill of goods directed the seller to send his bill to a third person, who the purchaser said would settle it, and directed the seller also to send to such third person a note which the seller held against the purchaser, and the seller went to the third person and, instead of getting the money, took his check payable five days after it was actually given, and forwarded the goods ordered, giving to the third person a receipt in full for the goods and delivering up to him the note, and sending to the purchaser the receipt to the bill, there was held to be a payment which precluded the seller from recovering the price of the goods and also from recovering the amount of the note from the purchaser. *White v. Howard* (1847) 1 Sandf. 81. The court states that the giving of the note of a third person is different as to its effect as payment from that of a party giving his own note or check, or the note or check of his agent, and taking a receipt in full; that in case of the party's own check the payee, upon its dishonor, can go back to the original consideration. And it has been held that the acceptance of a bank draft for a contemporaneous debt raises a presumption that it was taken in payment, in the absence of an agreement to the contrary; the burden is on the payee of such a draft to show a contrary agreement if he takes the position that there was no payment. *Hall v. Stevens* (1889) 116 N. Y. 201, 5 L.R.A. 802, 22 N. E. 374. In this case the vendor of cattle accepted a bank draft payable to his own order for the precise amount due him upon the delivery of the cattle. Subsequently, upon the dishonor of the draft, he brought suit against the vendee, claiming that the draft was not accepted in payment. The court states that the answer to the question whether or not the draft was accepted in payment "depends upon whether the draft was taken for a present or a precedent debt. If it was for the former the presumption is that it was agreed to be taken in payment, and the burden of proving the contrary rested upon the plaintiff; while if it was for the latter, the presumption is that it was not taken as payment, and the onus of establishing that it was so taken rested upon the defendants." The court holds that the draft was accepted upon a contemporaneous debt, and that the presumption, therefore, was that the vendor accepted the draft in payment and satisfaction of his demand for the cattle, and holds that there was no evidence of any intention to accept the draft for any purpose other than that of payment.

In the case of a bank draft sent in payment of an insurance policy, according to the request of the insurance company's agent, it has been held that the acceptance of the draft amounted to a payment,
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although the draft was subsequently dishonored. *Mutual L. Ins. Co. v. Chattanooga Sav. Bank* (1915) 47 Okla. 748, L.R.A. 1916A, 669, 150 Pac. 190. The court in this case, however, makes a distinction between a life insurance premium and a debt, holding that the annual premium stipulated for in a life insurance policy is not a debt, and that the strict rule governing the payment of debts by check or draft does not control the payment of such premium.

And in *MacMahon v. United States L. Ins. Co.* (1904) 68 L.R.A. 87, 63 C. C. A. 130, 128 Fed. 388, the sending of the renewal receipt by an insurance company upon receiving a bank draft to its order for the premium, which was sent according to its direction after inquiry as to remittance by the insured, was held to constitute a renewal of the insurance for another period which could not be repudiated by the insurer upon the dishonor of the draft because of failure of the drawer after the draft had been received by it. In this case, also, a distinction is made between a debt and a life insurance premium.

And see the reported case, *McGLYNN v. HASTIE*, *ante*, 62.

W. A. E.

[ENGLISH COURT OF APPEAL.]

JEFFERSON *v.* PASKELL.

[1916] 1 K. B. 57.

Also Reported in 85 L. J. K. B. N. S. 398, 113 L. T. N. S. 1189, 32 Times L. R. 69.

Marriage — Breach of promise — Illness of plaintiff at date fixed for marriage — Onus of proving fitness to marry within a reasonable time afterwards.

Where the plaintiff in an action for breach of promise of marriage was admittedly in such a state of health on the date fixed for the wedding as to be unfit to marry, and was therefore not ready at that date to marry the defendant, the onus lies upon the plaintiff of proving that she was ready, that is to say, fit, to marry the defendant within a reasonable time thereafter; but slight evidence is sufficient to discharge this onus.

— Belief in unfitness as defense.

The fact that the defendant honestly and on reasonable grounds believed that the plaintiff was unfit for marriage is no defense to an action for breach of promise of marriage, if the plaintiff was not in fact unfit.

The question whether and in what circumstances illness is a valid excuse for refusal to marry discussed.

Observations on *Hall v. Wright* (1858) El. Bl. & El. 746, 765, 120
Eng. Reprint, 688, 29 L. J. Q. B. N. S. 43, 6 Jur. N. S. 193, 1 L. T. N.
S. 230, 8 Week. Rep. 160, by Phillimore, L.J.

(October 29, 1915.)

APPLICATION for judgment or a new trial in an action tried before Bray, J., and a special jury.

The action was brought by the plaintiff, Miss Lillian Ida Jefferson, against the defendant, Ernest C. Paskell, to recover damages for breach of promise of marriage.

The statement of claim was as follows:

"1. On the 31st of July, 1912, the defendant verbally promised to marry the plaintiff within a reasonable time.

"2. On or about the 7th day of March, 1913, the defendant verbally promised to marry the plaintiff on the 28th of March, 1913, or alternatively within a reasonable time thereafter, and on the 14th day of March, 1913, the plaintiff verbally consented that the date of the said marriage should be postponed until the 2d of April, 1913, and on or about the 18th of March, 1913, the plaintiff verbally consented that the date of the said marriage should be postponed until the 9th of April, 1913.

[58] "3. In breach of his said promise the defendant refused and neglected to marry the plaintiff on the 28th March, 1913, or within a reasonable time thereafter, and by letter dated the 12th September, 1913, written by his solicitors and agents, has wholly refused to marry the plaintiff."

The defense (so far as material) was as follows:

"1. The defendant denies that on the 31st July, 1912, he promised to marry the plaintiff. The defendant promised on the 9th November, 1912, to marry the plaintiff, and not previously.

"3. Before the date fixed for the said intended marriage as above mentioned" (April 9, 1913), "namely, on or about the 27th March, 1913, the defendant for the first time discovered, as the fact was, that during the month of March, 1913 (the defendant cannot give the exact date), the plaintiff had contracted the disease of tuberculosis. At the said date the plaintiff was so ill from the said disease that she was not able to be married, and was about the said date verbally advised by her medical advisers that

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she could not marry. . . . The plaintiff continued to suffer from the said disease from the 27th March, 1913 (or thereabouts), until the commencement of this action.

"4. By reason of the facts mentioned in paragraph 3 hereof the defendant became entitled to and did by letter from his solicitor to the plaintiff's father on her behalf, dated the 14th April, 1913, validly rescind the said contract of marriage, and thereafter ceased to be bound to marry the plaintiff.

"5. Further or alternatively by reason of the facts mentioned in paragraph 3 hereof the plaintiff was never ready and willing to marry the defendant."

At the trial the defendant obtained leave to raise by way of amendment a further defense that he honestly and on reasonable grounds believed the plaintiff to be in such a condition as to be unfit for marriage.

The following statement of the facts is taken from the judgment of Swinfen Eady, L.J.:

"The plaintiff was twenty-two years of age on September 17, 1912, and is the daughter of the late Robert Louis Jefferson, who was engaged in the motor trade. The defendant was then thirty-nine years of age, and is engaged in the cycle trade. There is no [59] dispute about the promise to marry, although the parties are not entirely agreed as to when it was made, but at all events by November, 1912, there was a mutual engagement to marry.

"In March, 1913, a house had been taken as a home for the parties when married, the marriage license had been obtained, the wedding ring bought, the date of the marriage fixed for April 9, and arrangements made for the ceremony to be performed on that day.

"On March 27, however, the plaintiff was taken ill; she ascribed her illness to the effects of a chill; she was seen on that day by Dr. Jones (who was away and unable to be called at the trial); a further opinion was considered desirable, and she was seen the next day by Dr. Douglas Stanley, of Birmingham, a medical man of experience and authority on diseases of the chest; he was called at the trial and stated that the plaintiff had marked signs of pleurisy, and that her whole condition was tuberculous; that he told the plaintiff she was suffering from pleurisy, not

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wishing to alarm her; but he formed a very clear opinion that she was suffering from tuberculosis, and so informed the defendant, who had accompanied her to see the physician.

"In any case, her condition was such that the marriage could not take place on April 9.

"The plaintiff, after a short interval, namely, on April 8, entered a sanatorium known as the Nordrach-on-Mendip Institute, where her sister Haidée, who was admittedly suffering from consumption, was already a patient. The defendant paid to the plaintiff's mother a sum of 100*l.* toward expenses at the institute and liabilities incurred for things purchased by the plaintiff with a view to the marriage, and offered to find more money when that sum was exhausted. Disputes, however, arose between the plaintiff's father and the defendant, as to which the defendant consulted his solicitor, and on April 14, 1913, the defendant's solicitor wrote to the plaintiff's father a letter in which (after dealing with the disputes) the following passage occurs: 'Mr. Paskell instructs me to say that he is still willing to do what he can for your daughter, but thinks it only right to at once inform you that after earnest consideration he cannot in the present state of your daughter's health contemplate proceeding with the projected marriage.' This letter did not come to the knowledge of the plaintiff until after she had been in the [60] sanatorium about five weeks; that is to say, towards the middle of May. The plaintiff remained at the institute until May 24, when on account of expense both the plaintiff and Haidée were removed by their parents and taken to Weston-super-Mare. Haidée ultimately died there from consumption, but the plaintiff rapidly improved in health. She increased in weight, took much exercise, was able to dispense with any medical attendance, and became apparently quite well.

"Shortly before the plaintiff left the institute the defendant went to America on business, and did not return until July. He saw the plaintiff at the end of July, and then quite definitely refused to marry her.

"The plaintiff was examined professionally by Dr. Fligg at Weston-super-Mare on August 12, 1913, when he gave a certificate in the following form, which he said was true and accurate.

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rate: 'I have this day examined Miss Lillian Ida Jefferson, aged 23, height 5 ft. 3 in., weight 9st. 6lbs., a well-formed and well-developed young woman with a natural healthy color, and am of opinion that she is in good health.'

"On September 4 the plaintiff's solicitors wrote, saying: 'We feel sure you will agree that as our client has fully recovered from her illness she is entitled to know exactly where she stands and what your client's intentions are;' and in reply the defendant's solicitor wrote on September 12 that notwithstanding the defendant's great affection for the plaintiff the contemplated marriage could not now take place, and added: 'It is a most unfortunate result, but it is dictated by the responsible advice which my client has received as to your client's condition of health and the family history on both sides.'

"The writ was thereupon issued on September 23, 1913, and the action was tried by Bray, J., and a special jury in November, 1914, when certain questions were left to the jury, which with the answers thereto were as follows:

"1. Was the plaintiff suffering from tuberculosis (a) between the 28th day of March and the 15th day of April, 1913?—Answer: The evidence the jury have heard is not sufficient to satisfy them that the plaintiff was suffering from tuberculosis between the 28th March and 15th April. (b) On the 12th September, 1913?—Answer: No.

[61] "2. Was the plaintiff on the 12th day of September in such a condition as to be unfit for marriage within a reasonable time after that day?—Answer: No.

"3. Did the defendant on the said day honestly and on reasonable grounds believe her to be in such a condition as to be unfit for marriage within a reasonable time after the said 12th day of September?—Answer: No.

"4. Did he refuse to marry her on that ground?—Answer: No.

"5. What damages do you find?—500*l*."

The learned judge gave judgment for the plaintiff for 500*l*.

The defendant appealed, and asked for judgment, or in the alternative for a new trial, upon the grounds of misdirection and that the verdict was against the weight of the evidence. The

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passages in the learned judge's summing up to the jury which were relied upon as being a misdirection were the following:

The learned judge at the commencement of his summing up to the jury said: "The promise is admitted, and of course it is perfectly clear that there was a promise. It is also quite clear that there was a refusal to marry. The defendant sets up, and it is for him to prove his case, that by reason of certain circumstances he was justified in refusing to marry, and therefore there was no breach of contract. He says that the lady's health was such that she was unfit to be married, and there is no doubt that if it be proved that her health was in fact in such a condition that she could not be married within a reasonable time, the defendant would be entitled to refuse to marry her." Later, after having commented on the evidence, the learned judge said: "Now I must say something about the particular issues which you have to decide. Was the plaintiff suffering from tuberculosis (a) between March 28 and April 15; (b) on September 12, 1913? The first part I have asked at the request of the defendant's counsel, but to my mind the material question is on September 12, because that is when the breach, if there was a breach, took place. You have heard the evidence of the doctors. I must tell you with regard to this that the onus of proof is on the defendant. He has to prove this, and therefore if the evidence leaves you in doubt as to whether she was suffering or not you must say, 'No,' or if you like to put it in this way, 'We are not satisfied,' you can put it in that way; but the plaintiff is entitled [62] to have your verdict upon that point in her favor unless the defendant has satisfied you of what he alleges; namely, that she was suffering from tuberculosis." And further on he said: "The next question is this: Was the plaintiff on September 12 in such a condition as to be unfit for marriage within a reasonable time after that day? There again it is for the defendant to satisfy you that she was unfit to be married within a reasonable time after that day. Of course that depends to a great extent upon the view you take as to whether she was suffering from tuberculosis. Of course, if you thought she was substantially suffering from tuberculosis on September 12, then you would probably think that she was unfit for marriage."

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McCall, K.C., and H. St. J. Field, for the defendant. Upon the evidence the jury could only answer the questions left to them in the defendant's favor. At the least their findings were against the weight of the evidence. If, as the evidence showed, the plaintiff was suffering from tuberculosis, the defendant was entitled on that ground to refuse, which he did by the letter of April 14, to perform his promise to marry. *Atchinson v. Baker* (1796) Peake, N. P. Add. Cas. 103, at p. 104; *Liddell v. Easton's Trustees* [1907] S. C. 154. In *Hall v. Wright* (1858) El. Bl. & El. 746, 765, 120 Eng. Reprint, 688, 29 L. J. Q. B. N. S. 43, 6 Jur. N. S. 193, 1 L. T. N. S. 230, 8 Week. Rep. 160, it was decided that bodily illness of the defendant supervening after the contract, which rendered him unfit to marry, was no answer to an action by the other party for breach of promise of marriage. In that case the defendant pleaded his own illness as an excuse for not marrying, but the plaintiff was willing to marry him and insisted upon his carrying out his promise. In the present case the defendant does not set up his own illness, but the illness of the plaintiff. Moreover, if that case is to be taken as laying down a general rule that illness of one of the parties is no excuse for the refusal by the other party to marry, it ought not to be followed. Both in the Court of Queen's Bench and in the Exchequer Chamber there was a great difference of opinion, six judges against five, and the decision was not approved in *Liddell v. Easton's Trustees*, *supra*, in the Court of Session, nor in the American case of *Allen v. Baker* (1882) 86 N. C. 91, 41 Am. Rep. 444. [*Harrison v. Tennant* (1856) 21 Beav. 482, 52 Eng. Reprint, 945, was also referred to.]

[63] Next, the defendant is entitled to a new trial on the ground of misdirection. The plaintiff's illness admittedly rendered her unfit to marry on April 9. The onus was then cast upon the plaintiff of showing that she had so recovered from her illness as to be fit to marry within a reasonable time after that date. She had to prove that she was ready and willing to marry on April 9 or within a reasonable time afterwards. Admittedly she was not ready to marry on that date, as she was not fit to marry then, and it lay upon her to prove that she was ready, that is, fit, to marry within a reasonable time after that date. The learned
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judge misdirected the jury in directing them that it was for the defendant to prove that she was unfit to marry within a reasonable time, and that if the jury were not satisfied of this they ought to find for the plaintiff. This was a misdirection on a material point, which may have led the jury to find for the plaintiff, and therefore there ought to be a new trial. [They also contended that the learned judge misdirected the jury in telling them that the breach took place on September 12—the date most favorable to the plaintiff's case—instead of leaving it to them to say whether the refusal to marry took place on April 15, when the defendant's solicitor's letter of April 14 to the plaintiff's father was received, or in May, when that letter was communicated to the plaintiff, or on some other date.]

Further, the evidence shows that the defendant had a reasonable belief that the plaintiff was suffering from tuberculosis at the date when he refused to carry out his promise to marry, and that is an answer to the action. The defendant was informed by the specialist who examined the plaintiff on March 28, 1913, that she was suffering from tuberculosis, and the other doctors confirmed that opinion. The defendant was entitled to act upon the scientific opinion of the medical men, and the conduct of the plaintiff herself confirmed their view. The principle of *Bloomer v. Bernstein* (1874) L. R. 9 C. P. 588, 43 L. J. C. P. N. S. 375, 31 L. T. N. S. 306, 23 Week. Rep. 238; *Morgan v. Bain* (1874) L. R. 10 C. P. 15, 44 L. J. C. P. N. S. 47, 31 L. T. N. S. 616, 23 Week. Rep. 239, and *Foulkes v. Sellway* (1800) 3 Esp. 236, applies. There was no evidence upon which the jury were entitled to answer questions 3 and 4 as they did.

Marshall-Hall, K.C., and H. Maddocks, for the plaintiff, were not called upon on the question of reasonable belief. There was no [64] misdirection by the learned judge. The burden of proving that the plaintiff was not fit to marry within a reasonable time after April 9, the date fixed for the marriage, lay on the defendant. The contract was that the defendant would marry the plaintiff within a reasonable time. The date fixed for the marriage was April 9, but that date was no part of the contract to marry. The promise was a general one,—to marry within a reasonable time. The defendant set up the defense that the plain-

tiff was suffering from tuberculosis in March, 1913, and he had to prove it. He failed to do so. No doubt the plaintiff was not fit to marry on April 9, owing to a temporary illness, but that does not affect her readiness and willingness to marry. "Ready" means ready to marry within a reasonable time, and the plaintiff was always ready in that sense. September 12 was taken to be a reasonable time, and the defendant broke his promise then. The performance of the contract was merely suspended during her illness, and the plaintiff was ready and willing to marry in September. The case was fought at the trial upon the footing that the breach took place on September 12. The onus was on him to show that she had not recovered from her illness within a reasonable time after April 9. The learned judge, therefore, properly directed the jury upon this point. Even if the onus was on the plaintiff of showing that she was fit to marry within a reasonable time, she discharged that onus. The medical evidence showed that she had recovered from her illness on August 12. Therefore, even if there was a technical misdirection, no substantial wrong or miscarriage was occasioned thereby, and the court will not order a new trial. Order xxxix., r. 6.

Next, the illness of the plaintiff is not a sufficient excuse for the defendant refusing to carry out his promise to marry. The contract to marry is a contract to enter into the state of matrimony, and if the plaintiff is able to go through the ceremony of marriage the illness of the plaintiff is no excuse. Lord Campbell, Ch. J., in *Hall v. Wright* (1858) El. Bl. & El. at p. 761, 120 Eng. Reprint, 694, 29 L. J. Q. B. N. S. 43, 6 Jur. N. S. 193, 1 L. T. N. S. 230, 8 Week. Rep. 160, disapproved of the observation of Lord Kenyon, Ch. J., in *Atchinson v. Baker* (1796) Peake, N. P. Add. Cas. 103, at p. 104, and said: "As yet there has been no decision that for anything supervening after the contract to marry, unfitting either party fully to perform the duties of the married state, the party so unfitted may treat the contract as dissolved, the other still desiring [65] that the marriage ceremony should be performed." This judgment was affirmed by the majority of the judges in the Exchequer Chamber, and was followed in *Baker v. Cartwright* (1861) 10 C. B. N. S. 124, 142 Eng. Reprint, 397, 30 L. J. C. P. N. S. 364, 7 Jur. N. S. 1247, 10 B. R. C.

the report in the Law Journal making it clear that the case was decided upon the authority of *Hall v. Wright* (1858) El. Bl. & El. 746, 765, 120 Eng. Reprint, 688. If in fact the plaintiff was on April 9 suffering from an illness which prevented her from marrying the defendant on that day, a reasonable time must be allowed for the plaintiff to recover from the illness and to become fit to marry. Her illness merely gave a reason for delay, and did not relieve the defendant of his obligation to perform the contract. The jury have found, upon evidence which justified them in so finding, that the plaintiff was fit for marriage on September 12; that is, within a reasonable time. [They also contended that the verdict was not against the weight of the evidence.]

McCall K.C., in reply. Admittedly the plaintiff was unfit to marry on April 9 through illness, and the learned judge misdirected the jury as to the onus of proving that she had recovered from her illness within a reasonable time. If this had been properly explained to the jury, they might have found the other way. The court ought, therefore, to grant a new trial. *Jones v. Spencer* (1897) 77 L. T. N. S. 536, 14 Times L. R. 41.

Cur. adv. vult.

Swinfen Eady, L.J., read the following judgment: The defendant on this appeal asks for judgment or a new trial, the plaintiff having obtained a verdict and judgment for 500*l.* damages.

The action is for breach of promise of marriage. [The Lord Justice stated the facts as above set out.]

The defendant complains of misdirection, and that the verdict was against the weight of the evidence; he also complains of insufficient direction, that the jury did not have such assistance from the judge as they were entitled to, and he relies especially upon the fact that in dealing with the X-ray examination of the plaintiff the judge did not in his summing up refer to the fact that Dr. Harman Brown was present on behalf of the plaintiff, but was not called at the trial. The misdirection complained of is that [66] the judge wrongly ruled that the breach of contract was in September. It was contended that he ought either to have

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left the date to the jury, or to have ruled that the date was either April 14, when the letter to the father was written, or in May, when the contents of it were communicated to the plaintiff, or July 29, the last interview with the plaintiff, when the defendant certainly refused to marry the plaintiff. The further misdirection complained of is that the judge told the jury that the burden of proof was on the defendant. The judge said (in an early part of his summing up): "The defendant sets up, and it is for him to prove his case, that by reason of certain circumstances he was justified in refusing to marry, and therefore there was no breach of contract." And again, later on in his summing up, he said this: [The Lord Justice read the second of the two passages set out above.]

In considering this case, the main contention on the one side and on the other must always be borne in mind. It being common ground that on the actual date fixed for the marriage (April 9, 1913), the plaintiff was unwell, and that it was quite obvious that the wedding must be postponed on that account. The defendant alleges that she was then suffering from tuberculosis, that he produced medical evidence to that effect, and that she had not recovered from this disease by September, and therefore certainly not by July. The plaintiff's case, on the other hand, is that she was suffering in April from the effects of a chill caught perhaps on March 27; that she had an attack of pleurisy, but not tuberculosis; that she never suffered from tuberculosis; that she was well by May 27, 1913, when examined by Dr. Fligg; that in July, 1913, when she met the defendant on his return from America, she was in complete health; that the certificate given by Dr. Fligg on August 12, 1913, was completely true; that she was then in good health; and that the contention that two or three months previously she had been in consumption was quite unfounded. Those were the principal contentions of the respective parties.

The plaintiff's pleading contains by implication (order xix., r. 14) an allegation that she is and always has been ready and willing to marry the defendant. The defendant meets this by alleging (paragraph 3 of the defense) that on March 27, 1913 (before the date [67] fixed for the wedding), he "discovered, as
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the fact was, that . . . the plaintiff had contracted the disease of tuberculosis," and "th plaintiff continued to suffer from the said disease from the 27th March, 1913 (or thereabouts), until the commencement of this action;" and in paragraph 5 of his defense he pleads that by reason of the facts mentioned in paragraph 3 the plaintiff was never ready and willing to marry the defendant. The plaintiff having given general evidence of her good health within a short time after the date fixed for the wedding, the burden of proving that she was then suffering from the disease of tuberculosis rested upon the defendant, who alleged it. The defendant alleging and the plaintiff denying the existence of the disease, the burden was not upon her of proving the negative, but upon the defendant to prove his allegation. "*Ei qui affirmat non ei qui negat incumbit probatio.*" This is the burden of proof to which the judge referred in his summing up. It is true that the judge did not point out to the jury that in the first instance the burden was upon the plaintiff to prove that she was ready, in the sense of being in a state of bodily fitness, and no longer prevented by the state of her health, as she admittedly was on April 9, yet this burden was *prima facie* discharged by the plaintiff's appearance at the trial apparently in good health, and by the medical evidence called on her behalf, and the real and substantial question between the parties was whether the plaintiff was suffering from tuberculosis, as alleged by the defendant, and the burden of proving this was upon the defendant, who alleged it. The point as to the burden of proof in the first instance is, in the present case, an academic one.

With regard to the other alleged misdirection, namely, the judge ruling that the breach was in September, instead of either leaving it to the jury or holding it to have been on April 14 or in July, it is manifest that the letter of April 14 did not then amount to a breach, as it was not written to the plaintiff and did not come to her knowledge until after she had been in the sanatorium about five weeks. No point was made at the trial as to whether the breach was in July or September; the jury negatived that the plaintiff was suffering from tuberculosis on September 12, 1913, and there was no evidence of any change in the plaintiff's condition between July and September. There was evi-

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dence that in July the defendant absolutely [68] refused to marry the plaintiff, but no question of whether there was a breach in July is raised by the pleadings; the plaintiff alleges a refusal by the letter of September 12, and the defendant does not dispute this, but sets up a rescission in April, which was not substantiated. Nor do I find from the shorthand notes that the judge was asked to leave to the jury any question of a breach in July, although at one time when Dr. Thurnam was in the witness box the judge said that one question for the jury would be whether the refusal at the end of July was justified.

Under these circumstances I am of opinion that no substantial wrong or miscarriage has been occasioned by the judge directing the jury that there was no breach before September 12, and a new trial ought not to be ordered on that account.

The defendant by amendment raised a further point, by way of defense, that he honestly and on reasonable grounds believed the plaintiff to be unfit for marriage. The jury negatived this in fact, and the defendant says that the verdict of the jury on this point is against the weight of evidence. In my opinion this point, even if the jury had found in the defendant's favor, would be no defense in law. If the plaintiff was not in fact unfit for marriage, the fact that the defendant honestly and on reasonable grounds believed that she was unfit might affect the amount of the damages, but would not affect the plaintiff's right to recover. And no complaint is made by the defendant that the damages are excessive. The case of *Baddeley v. Mortlock* (1816) Holt, N. P. 151, 17 Revised Rep. 626, is in point. It was an action for breach of promise of marriage brought by a man against a woman. The woman, having heard of charges being made against the man of dishonesty and perjury, said that unless he vindicated himself she would not marry him, and upon his omitting to do so broke off the match. It appears from the judgment that the mere belief that the charges were true was no defense in law. Gibbs, Ch. J., said: "She must show that the plaintiff is a man of bad character. . . . Without proof that the charges were founded, she is not absolved from her contract. But it affects the damages." The plaintiff recovered a verdict for 1 shilling damages.

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[The Lord Justice then dealt with the point about the X-ray examination and also with the contention that the verdict was [69] against the weight of evidence. There was medical evidence each way, and the contention could not, in his opinion, be supported.]

The other matters complained of in the summons up are of minor importance, and I am satisfied that no substantial wrong or injustice has been occasioned to the defendant by any of the matters complained of.

In my opinion the appeal fails and should be dismissed.

Phillimore, L.J., read the following judgment: The plaintiff, a young woman of twenty-two, brings this action for breach of promise of marriage against the defendant, a man of thirty-nine. In her statement of claim she alleges an engagement in 1912, and the fixing of the day of marriage, first for March 28, and then for April 9, 1913, and the breach of which she complains is that the man did not marry her then or within a reasonable time thereafter. She also states, but apparently rather as evidence or confirmation of the breach than as in itself a breach, a positive refusal by letter on September 12. In his defense the man admits the engagement in 1912, though not so early in the year, and the fixing of the date of marriage for April 9. He proceeds to state that by letter dated April 14 he refused to marry the woman, and he justifies his refusal by saying that she had contracted tuberculosis. He further pleads that she was never ready and willing to marry him.

The facts of the case have been fully stated by **Swinfen Eady, L.J.** [Having stated the effect of the medical evidence at the trial, the Lord Justice continued:] The jury had the advantage of seeing the woman and judging of her appearance at the trial in July, 1914. **Swinfen Eady, L.J.**, has stated the questions put to the jury and their answers.

I will deal first with the questions 3 and 4, which were put in consequence of an amended defense which the man was allowed to raise at the trial, to the effect that he honestly believed her to be unfit for marriage within a reasonable time; and it is best in the first instance to determine upon its validity. I am of opinion that

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it is not a valid defense. A contract of marriage is in this respect like any other contract. The justification for the refusal to carry it out must be found in the actual facts, and not on belief or opinion, however reasonable or honest, as to what the facts are. [70] If instead of want of health the question had been one of want of chastity, it will be very apparent that the objective truth, and not the subjective belief, would have to be looked for. This being so, it is unnecessary to inquire whether the answers of the jury to the two questions 3 and 4 were or were not justified by the evidence.

Another point lies *in limine*. It was contended by counsel for the woman that ill health is not a justification for refusal to perform the promise to marry, and for this the case of *Hall v. Wright* (1858) El. Bl. & El. 746, 765, 120 Eng. Reprint, 688, 29 L. J. Q. B. N. S. 43, 6 Jur. N. S. 193, 1 L. T. N. S. 230, 8 Week. Rep. 160, was cited. This case has been much observed upon; but it is unnecessary to consider its weight, because it has no bearing upon the one before us. In *Hall v. Wright*, the man pleaded his supervening ill health as his justification for refusal. The woman was willing to marry him notwithstanding. Whether the decision was that in no case could a party rely on his or her own ill health as a justification, or whether, as some have thought, the case turned upon a point of pleading or upon the insufficiency of the degree of ill health pleaded, it has no bearing upon a case where the ill health is that of the insisting party. On principle it would seem that there must be some cases of mental or physical infirmity (as it has been decided that there are cases of moral infirmity) which, supervening after the promise, or, I would add, first coming to the knowledge of the party after the promise, will justify him or her in refusing to marry.

The matter is therefore clear for considering questions and answers 1 and 2.

It is contended for the man that the answers are unreasonable, and that the verdict is against the weight of evidence and should be set aside; and it is further contended that there was misdirection. After consideration and reading the medical evidence again, I do not think that the balance is so strongly the other way

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that if the jury was properly directed the verdict could be set aside.

There is more difficulty about the misdirection. Two complaints are made: (1) That the date of the breach was material, and the judge assumed the date most favorable to the woman, whereas he ought to have taken another date, or at least to have left it to the jury. (2) That whenever he dealt with the burden of proof he put it upon the man. There are certainly points in the handling of the case by the learned judge which are not satisfactory and which [71] put difficulty in the way of the woman keeping her verdict. We have to see if they are sufficient to entitle the man to a new trial. As to (1), the woman in her statement of claim gave, as already stated, no precise date for the breach, laying it merely as a refusal to marry within a reasonable time after March 28 or April 9. The man put the breach when his solicitor's letter of April 14 would be received. The judge intimated most strongly his opinion that the true date was September 12, and though, upon the insistence of the man's counsel, he put question 1 with alternative dates, he gave no such alternative for question 2. There are four possible dates,—April 15, an early day in May, July 29, and September 12. I agree that April 15 as an exact date may be ruled out. The letter was not to her, and for reasons of kindness to her it was not intended to reach her then. But it was intended to reach her in time, and it did reach her early in May. The date in May on which she had knowledge of the letter of April 14 is important. If there was no breach in May there almost certainly was on July 29, and it was wrong to suggest that the breach did not take place until September 12. But though the judge did once intimate that the July date might be the right one, neither side asked him to put the July date, and there was no evidence that the state of the woman's health materially differed from July 29 to September 12. The two dates, therefore, to be discussed were early May and September 12, and unfortunately the judge never left to the jury the question which was the right one.

Upon the other question the learned judge directed the jury that the burden of proof that the woman was unfit for marriage on September 12, which is the date he takes, was on the man.

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In this he is, in my view, wrong. In every contract the party who seeks to recover damages for the breach must prove that he or she was ready and willing to perform it. Now admittedly on the date fixed for the marriage,—that was April 9,—the woman was not ready; she was not fit. The burden of proof was upon her to show that she would be fit within a reasonable time, or that she actually became fit before breach. There was no burden upon the man to show that she was unfit. But when the woman admitted that she was not fit on April 9 she admitted no more. She did not admit that she had a permanent or even a prolonged illness. The man, if he relied on her [72] having tuberculosis or any other permanent or prolonged illness, had to prove it, and the learned judge rightly laid the onus on him so far, and the question was rightly put as to tuberculosis, Are you satisfied that she had it? If she did not have tuberculosis in April or in September, then all that she has to prove is that from whatever illness she had in April either she would recover in a reasonable time, or did actually recover before breach. And if it was not tuberculosis in April, if for instance, it was pneumonia or even pleurisy, there is no serious question that she had recovered by the end of July. The jury were rightly directed upon question 1, and if their verdict on this question was right the misdirection upon question 2 becomes unimportant, nor does it matter which was the date of the breach. The misdirections, therefore, both as to date of breach and as to burden of proof, come within order xxxix., r. 6,—no “substantial wrong or miscarriage has been thereby occasioned,”—and do not compel us to grant a new trial. If she had not tuberculosis in April, she had only an illness which would not prevent her marrying within a reasonable time.

It matters not whether the breach was in April or May or July or September. If it was either of the two former, she was not in a state of health which justified the man in thinking that she would not be fit to marry within a reasonable time. If it was either of the two latter, she had recovered, and so plainly recovered (tuberculosis being out of the way) as to make the burden of proof an academical question.

Upon the whole, though, as I have said, there were in my
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opinion misdirections, they are not of sufficient importance to have affected the verdict, and we ought not to grant a new trial.

Pickford, L.J.: read the following judgment: This was an action for breach of promise of marriage in which judgment was given for the plaintiff upon certain findings of the jury. The defendant by his appeal asks for judgment or a new trial, but in substance his application is for a new trial upon the grounds of misdirection and of the verdict being against the weight of evidence.

It is not necessary to repeat the facts.

The defense set up to the action by the defendant was that the plaintiff was suffering from tuberculosis on March 27, 1913, and [73] from that date continuously until the commencement of the action. He also, by amendment during the trial, alleged as a defense that he reasonably believed her to be so suffering, and was on that ground exonerated from his promise. The questions put to the jury and their answers have already been stated, and I need not repeat them. I do not think that, strictly speaking, the right questions were put to the jury, but if the first finding stands, this is of no consequence, as the only suggested defense was tuberculosis, and there is no ground for contending that if she were not suffering from that disease in March and April, 1913, she ever suffered from it at all.

With regard to the defense raised by amendment, the plaintiff contended that it was no defense to an action for a breach of promise to marry that the defendant reasonably believed that the plaintiff was so ill as to be unfit to marry, if in fact that belief was wrong. I am of opinion that this contention is correct, and that such reasonable but unfounded belief affords no defense.

The plaintiff also contended that, even if she were suffering from tuberculosis, that afforded no defense, while the defendant's contention seemed to me to go so far as to allege that if a woman had ever suffered from that disease she could never enforce a promise to marry. I am not prepared, as at present advised, to accept a contention so wide as the defendant's, but I think there may be tuberculosis existing to such an extent and of such a

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nature as to make the woman unfit for marriage, and therefore to afford a defense.

It remains, therefore, to be seen whether the jury's answer to the first question can be supported. The defendant alleged the breach of the promise to have taken place on April 14, the plaintiff on September 12. I am not satisfied that either of these was the correct date, but if the first answer is correct the date becomes immaterial. The defendant objects to this finding, first, on the ground of misdirection; and the misdirections alleged are, in substance (1) that the learned judge was wrong in directing the jury that the onus of proving that the plaintiff was suffering from tuberculosis and unfit for marriage was upon the defendant; and (2) that he misled them by insufficient and incorrect direction as to the evidence. The passages as to the onus of proof to which objection was chiefly taken are those read by Swinfen Eady, L.J.

[74] I think that a plaintiff in an action for breach of promise, as in any other action of breach of contract, must prove that she is ready and willing to perform the contract, and an allegation to that effect was always contained in the older and more precise pleadings, and is now, according to order XIX., r. 14, to be implied. Ready includes, in my opinion, not being unfit by reason of illness. But very slight evidence is sufficient to discharge such an onus in the absence of contradiction, such as that she was following the ordinary pursuits of life.

This case is not quite so simple, as the plaintiff was, on the date fixed for the marriage, admittedly unfit to carry out the contract by reason of illness. The obligation on the defendant then became one to marry her in a reasonable time after that date, and I think there was the obligation upon her to show that a reasonable time had elapsed, and that she was ready and willing. But again I do not think that much evidence was necessary to enable her to discharge that onus, and I think she discharged it. She showed that she began almost at once to improve in health, and continued to do so, that in May and onwards she was following the ordinary avocations of life, and that the doctor who attended her considered her in good health. This would, unless displaced by evidence given on behalf of the defendant, entitle her to succeed on that question, and it was therefore necessary for the de-

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fendant to give such evidence and displace that given for the plaintiff. This he undertook to do by showing that she was, in March and April, suffering from tuberculosis, and therefore, although apparently well, was not really so, and was unfit for marriage. Unless he proved this, there was nothing to displace the case made by the plaintiff. This was the state of the evidence upon which the learned judge was directing the jury; and therefore, though I am not satisfied that his direction as to the onus of proof was strictly correct, I think it not unfairly represented the matters to be considered by the jury, and that even if it were not strictly correct they were not misled, and there was no miscarriage of justice in consequence of its incorrectness.

With regard to his direction as to the evidence, I think a judge is entitled to give the jury his views of the evidence, and is not obliged to detail to them every part of it, or every view which each party wishes them to take, so long as he does not mislead them as to the [75] matters they have to consider, or the evidence in the light of which they must consider them. I cannot see that the learned judge has done so in this case. Perhaps after so lengthy a trial he might have discussed the medical evidence in somewhat more detail, but I can see no reason for saying that the jury were in any way misled.

I think there is no objection to the finding on the ground of misdirection.

Then if the jury were properly directed, I do not think the verdict can be disturbed on the ground that it was against the weight of evidence. I do not think it necessary to go through the evidence. I think there was material upon which the jury could reasonably come to their conclusion, and it is material to notice that on this point the learned judge, who, like the jury, saw and heard the witnesses, agreed with the verdict. I do not, therefore, think that the first finding of the jury should be disturbed, and in that case it is unnecessary to consider the rest of the case, but I think it right to say that, if it were necessary to consider it, I have great doubt whether the third and fourth answers could be supported on the evidence.

In my opinion the appeal fails and should be dismissed.

Application dismissed.

Solicitors for plaintiff: *Maddocks & Colson, for Band, Hatton, & Company, Coventry.*

Solicitors for defendant: *Field, Roscoe, & Company, for Ansell & Sherwin, Birmingham.*

Note.—Disease, or physical disability, as defense to action for breach of promise to marry.

I. In general, 101.

II. Disease or illness arising or recurring after promise, 103.

III. Disease existing at time of promise, 105.

I. In general.

The view is taken in most cases that a contract of marriage is subject to an implied condition that the parties shall remain in a state of health which will permit the consummation of the contract without endangering the life or health of each other, and that in case a disease which would endanger the life or health of the parties, or make it improper to carry out the agreement, develops, without the party's fault, subsequently to the promise of marriage, this will constitute a good defense to an action for a breach of the contract. *Re Oldfield* (1916) 175 Iowa, 118, L.R.A.1916D, 1260, 156 N. W. 977; *Shackleford v. Hamilton* (1892) 93 Ky. 80, 15 L.R.A. 531, 40 Am. St. Rep. 166, 19 S. W. 5; *Gardner v. Arnett* (1899) 21 Ky. L. Rep. 1, 50 S. W. 840; *Trammell v. Vaughan* (1900) 158 Mo. 214, 51 L.R.A. 854, 81 Am. St. Rep. 302, 59 S. W. 79; *Allen v. Baker* (1882) 86 N. C. 91, 41 Am. Rep. 444; *Sanders v. Coleman* (1899) 97 Va. 690, 47 L.R.A. 581, 34 S. E. 621; *Travis v. Schnebly* (1912) 68 Wash. 1, 40 L.R.A.(N.S.) 585, 122 Pac. 316, Ann. Cas. 1913E, 914; *Liddell v. Easton* [1907; Ct. of Sess.] S. C. 154, cited in 2 Butterworths' Ten Years' Dig. 1898-1907, col. 141. Contra, *Hall v. Wright* (1858) El. Bl. & El. 747, 120 Eng. Reprint, 689, 29 L. J. Q. B. N. S. 43, 6 Jur. N. S. 193, 1 L. T. N. S. 230, 8 Week. Rep. 160.

In *Sanders v. Coleman* (1899) 97 Va. 690, 47 L.R.A. 581, 34 S. E. 621, *supra*, the court said: "It can no longer be doubted that, if the performance of a contract is rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance, and such a stipulation will be understood to be an inherent part of every contract. This principle, it would seem, should apply with peculiar force to a marriage contract, the performance of which, owing to causes subsequently intervening, and altogether independent of any default of the party, might result in consequences dis-

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astrous to the life or health of the parties, or either of them. We hold, therefore, that a contract to marry is coupled with the implied condition that both of the parties shall remain in the enjoyment of life and health, and, if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable."

And in *Wanecek v. Kratky* (1903) 69 Neb. 770, 66 L.R.A. 798, 96 N. W. 651, where the defendant failed on the day appointed for the wedding to appear for the ceremony, and an action was brought for breach of the marriage contract, the court stated that, attached to every contract of marriage, is an implied condition that any subsequent change in mental or physical condition of either party so as to render it impossible to accomplish the object of the marriage relation releases the parties from the agreement.

It is held that where the plaintiff was, at the time of the promise, suffering from a disease or disability disqualifying him or her for the marriage relation, of which the defendant had no knowledge at the time the promise was made, such disability may be asserted as a defense to an action for breach of promise upon the defendant's learning thereof. *Kantzler v. Grant* (1878) 2 Ill. App. 236; *Vierling v. Binder* (1901) 113 Iowa, 337, 85 N. W. 621; *Gring v. Lerch* (1886) 112 Pa. 244, 56 Am. Rep. 314, 3 Atl. 841; *Atchinson v. Baker* (1796) 2 Peake, N. P. Add. Cas. 103.

And in *Beans v. Denny* (1909) 141 Iowa, 52, 117 N. W. 1091, where the defendant set up the fact that the plaintiff was afflicted with syphilis, it was held that the court might have directed the jury that a person is always excusable for declining to carry out his promise of marriage to one afflicted with syphilis, unless made with knowledge of this condition, without qualifying the instruction by reference to unfitness for matrimony; but such qualification was held not prejudicial as there was no conflict in the evidence that the disease did render the sufferer unfit for matrimony.

In some cases, where one of the parties was suffering from a physical disability at the time the promise to marry was made, although the defendant had knowledge of it, it has been held that the disability constituted a good defense, where the consummation of the contract would be prevented by the disability, or would be contrary to public policy. *Gulick v. Gulick* (1879) 41 N. J. L. 13; *Grover v. Zook* (1906) 44 Wash. 489, 7 L.R.A.(N.S.) 582, 120 Am. St. Rep. 1012, 87 Pac. 638, 12 Ann. Cas. 192.

It appears that a mere belief that the other party is physically disqualified from entering the marriage relation will not excuse performance of the contract.

Thus it will be observed that in the reported case (*JEFFERSON v. PASKELL*, ante, 81) it was held not a defense to an action for breach
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of promise that the defendant honestly, and on reasonable grounds, believed that the plaintiff was unfit for marriage for the reason that she had contracted tuberculosis after the promise was made, where she was not in fact unfit therefor. Phillimore, L.J., here states that a justification for a refusal to carry out the contract must be found in the actual facts, and not in belief, or opinion, however reasonable or honest it may be.

And in *Smith v. Compton* (1902) 67 N. J. L. 548, 58 L.R.A. 480, 52 Atl. 386, it was held that nothing would excuse a defendant for a breach of promise but a disease, or complication thereof, such as renders the making of the marriage contract and its consummation by intercourse impossible.

The defendant in *Baker v. Cartwright* (1861) 10 C. B. N. S. 124, 142 Eng. Reprint, 397, 30 L. J. C. P. N. S. 364, 7 Jur. N. S. 1247, set up that the plaintiff, prior to the making of the promise to marry, had been insane and an inmate of an asylum, and that he did not know of this until subsequent to the promise, but this was held no defense as it appeared that the plaintiff was of sound mind when the promise to marry was made.

II. Disease or illness arising or recurring after promise.

As before intimated the development of a disease after the making of the promise to marry, without any fault of the defendant, is generally held to constitute a defense to an action for breach of promise, where the disease would endanger the life of the party, or render it improper to carry out the agreement.

Thus in *Sanders v. Coleman* (1899) 97 Va. 690, 47 L.R.A. 581, 34 S. E. 621, where, after the promise to marry was made, a man, without his fault, developed a disease of the urinary organs which was of such a character that marriage would endanger his life or health, this was held a good defense to an action for breach of promise.

And it has been held that if a loathsome venereal and contagious disease, which developed in a man after the promise to marry, without any intervening fault on his part, was permanent in character, it would constitute a defense for breach of promise, or, if only temporary, would justify his postponing the marriage until he was cured. *Trammell v. Vaughan* (1900) 158 Mo. 214, 51 L.R.A. 854, 81 Am. St. Rep. 302, 59 S. W. 79.

And in other cases where the defendant at the time of the promise to marry believed that he had been cured of syphilis, which he had before contracted, it was held that its reappearance, without his fault, after the engagement, constituted a good defense to an action for breach of promise. *Shackleford v. Hamilton* (1892) 93 Ky. 80, 15 10 B. R. C. P.U.R.1922D.

L.R.A. 531, 40 Am. St. Rep. 166, 19 S. W. 5; *Gardner v. Arnett* (1899) 21 Ky. L. Rep. 1, 50 S. W. 840; *Allen v. Baker* (1882) 86 N. C. 91, 41 Am. Rep. 444.

The court in *Allen v. Baker*, *supra*, with respect to the fact that the disease was due to the defendant's own fault prior to the engagement, said: "We are not unmindful of the fact that the malady under which the party in this instance labored was the legitimate result of his own imprudence, . . . but, if contracted when he owed no duty to the plaintiff, we cannot see how that can vary the case."

And it has been held that a man who, after promising to marry, is afflicted with pernicious anemia, which is incurable and will be fatal within a short time, may repudiate the contract without subjecting his estate to liability for damages, where consummation of the marriage would tend to hasten the disease and shorten his life. *Re Oldfield* (1916) 175 Iowa, 118, L.R.A.1916D, 1260, 156 N. W. 977, Ann. Cas. 1917D, 1067.

And supervening insanity has been held a good defense to an action for breach of promise to marry. *Liddell v. Easton* [1907; Ct. of Sess.] S. C. 154, cited in 2 Butterworths' Ten Years' Dig. 1898-1907, col. 141.

And in *Travis v. Schnebly* (1912) 68 Wash. 1, 40 L.R.A.(N.S.) 585, 122 Pac. 316, Ann. Cas. 1913E, 914, where the plaintiff was in good health when the promise of marriage was made, but subsequently, without the fault of either party, became ill, it was held that the defendant would not be required to wait an unreasonable length of time for her recovery, and that if he waited a reasonable time for recovery and she had not recovered he was released from the agreement.

And in *Edmonds v. Hughes* (1903) 115 Ky. 561, 74 S. W. 283, the plaintiff's act in submitting, after the engagement, and without the defendant's knowledge, to an unnecessary operation which prevented her from having children, was held a good defense to an action for breach of promise.

It has been held that the fact that the defendant, after talking the matter over with the plaintiff, subsequent to the knowledge of his condition, offered to marry her, did not deprive him of the right to assert his condition as a defense, as there was no new contract to marry. *Gardner v. Arnett* (1899) 21 Ky. L. Rep. 1, 50 S. W. 840, *supra*.

The court in *Allen v. Baker*, *supra*, stated that if at the time of the promise, the defendant knew, or by the use of extraordinary diligence might have known, that the disease from which he was suffering was incurable, or of long duration, his subsequent incapacity from the recurrence of the disease would not constitute a defense,

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And there is an obiter statement in *Trammell v. Vaughan*, *supra*, that if the defendant had known of the disability at the time of making the promise the plaintiff would be entitled to treat his condition as a breach of contract.

In *Parsons v. Trowbridge* (1915) 140 C. C. A. 310, 226 Fed. 15, Ann. Cas. 1917C, 750, where an action for breach of promise was brought by a different plaintiff against the same man who was defendant in *Re Oldfield*, *supra*, an instruction was held as favorable as the plaintiff was entitled to which told the jury that if it were a fact that the defendant had a disease known as pernicious anemia, as illustrated by the testimony, this would not be a sufficient excuse for his not carrying out the contract, but that if he had pernicious anemia and believed that it would be fatal after a year or so from that time, they had the right to consider that upon the question of the amount of damages.

In *Hall v. Wright* (1858) El. Bl. & El. 747, 120 Eng. Reprint, 688, 29 L. J. Q. B. N. S. 43, 6 Jur. N. S. 193, 1 L. T. N. S. 230, 8 Week. Rep. 160, a divided court, in an action for breach of promise to marry, held that a plea that, after the engagement, the defendant became afflicted with a dangerous disease, which occasioned bleeding from the lungs, and was incapable of marriage without great danger of his life, did not set up a good defense. The view was taken by the judges sustaining the decision that the matter set up might be a good defense to an action for specific performance, but that it was not a ground for resisting the payment of damages for a breach of the contract; and they were of the opinion that there was no implied condition that the parties should remain capable of carrying out their contract. The views of the judges in this case for and against the validity of the defense were so contradictory, and the division of the judges so even, that its force as an authority is greatly reduced.

III. Disease existing at time of promise.

It has been held that, although the defendant had knowledge at the time the promise was made of an existing disability, this may be asserted as a defense, where the disability prevented the consummation of the contract, or rendered the marriage against public policy.

Thus in *Gulick v. Gulick* (1879) 41 N. J. L. 13, it was held a good defense to an action for breach of promise that the defendant knew, at the time he made the promise, that he was sexually incompetent because of an operation, on the ground that he could not bind himself to enter into a contract of marriage, which by force of its inherent conditions might be declared void *ab initio*, and that under such circumstances he might repudiate the agreement without rendering himself liable for a breach of it.

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And in *Grover v. Zook* (1906) 44 Wash. 489, 7 L.R.A.(N.S.) 582, 120 Am. St. Rep. 1012, 87 Pac. 638, 12 Ann. Cas. 192, it was held that a son of consumptive parents did not render himself liable in damages for breach of promise to marry a woman afflicted with pulmonary consumption, although he knew of her affliction at the time he made the promise, the court holding that a marriage under such circumstances would be contrary to public policy and a statute enacted to prevent the spread of consumption.

And in *Walker v. Johnson* (1892) 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100, there is an intimation by the court that the defendant's knowledge, at the time of the promise, of the plaintiff's diseased condition, might not preclude the assertion of such condition as a defense.

The plaintiff in this case suffered from epilepsy during the period of courtship, and the defendant was aware of this fact, but the disease was not pleaded as a bar, and the evidence was only relied upon to support the defense of no contract, and in mitigation of damages.

In *Lemke v. Franzenburg* (1913) 159 Iowa, 466, 141 N. W. 332, it was held that the fact that the plaintiff was, to the defendant's knowledge, in ill health at the time the promise to marry was made, was no defense to an action for a breach of promise; and where the defendant in this case admitted that he had agreed to marry the plaintiff if she regained her health, and there was evidence that she went to a physician suggested by him, and after treatments stated to the defendant that she had practically regained her health, there was held no error in permitting the physician to testify as to what he had told the plaintiff concerning her recovery, or in allowing him to testify that the plaintiff had recovered her health, and that such slight trouble as she had would be remedied by marriage. *Lemke v. Franzenburg, supra*.

As before stated, where one of the parties was, at the time of the engagement, suffering from a disease which disqualified the party for the marriage state, of which the other party had no knowledge, upon learning thereof, the disability may be interposed as a valid defense.

Thus the court stated in *Vierling v. Binder* (1901) 113 Iowa, 337, 85 N. W. 621, that it was no doubt true that physical defects, or disease, which incapacitate a woman for the marriage relation or childbirth, if unknown to the other party at the time the contract of marriage was attempted to be made, might be pleaded and proved in bar to an action for breach of promise; but it was held that this defense was not available where the diseased condition was pleaded merely to show that a contract was not made.

And it has been held error, in an action for breach of promise, to
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refuse a requested instruction by the defendant, that it would be a defense if the plaintiff was suffering from a venereal disease, of which the defendant had no knowledge, and of which he had no reason to suspect when the promise was made, or to modify the instruction so as to make the right to rely on the defense conditional on the defendant's having based his refusal to fulfil his promise on such ground. *Kantzler v. Grant* (1878) 2 Ill. App. 236.

And it has been held that a woman was justified in refusing to perform her agreement to marry where she subsequently discovered that the man with whom she had entered into the agreement had an abscess in his breast. *Atchinson v. Baker* (1796) 2 Peake, N. P. Add. Cas. 103.

And in *Goddard v. Westcott* (1890) 82 Mich. 180, 46 N. W. 242, it was held competent under the general issue to show by the plaintiff on cross-examination that she was suffering from a disease which disqualified her from marrying at the time the promise to marry was made, and that this condition was concealed from the defendant, the court stating that, if this appeared, the facts would show fraud, which would preclude a recovery of anything except possibly nominal damages.

And in *Gring v. Lerch* (1886) 112 Pa. 244, 56 Am. Rep. 314, 3 Atl. 841, where the defendant, after knowledge that the plaintiff's physical condition was such that sexual relations were impossible, adhered for some time to his promise in reliance on her promise to have the disability corrected by an operation, which it appeared was possible, it was held, upon her failure to submit to such an operation, that the defendant's assertion of the disability as a defense was good. The court here stated that an impediment to sexual intercourse, arising from the plaintiff's physical condition, need not be such as would sustain an action for divorce after marriage in order to constitute a defense to an action for breach of promise.

In *Hively v. Golnick* (1913) 123 Minn. 498, 49 L.R.A.(N.S.) 757, 144 N. W. 213, Ann. Cas. 1915A, 295, an action for breach of promise, the defendant pleaded as a defense that the plaintiff was afflicted with a chronic disease of an epileptic nature, and that she had fraudulently concealed this fact from him; but the evidence in the case was practically conclusive that the spells from which the plaintiff suffered were not of an epileptic nature, but were manifestations of hysteria, and also that the defendant knew of the spells, and the court stated that, though the issues might have been submitted to the jury, it was not prepared to say that a verdict for the defendant could be sustained, and that the court's direction of a verdict for the plaintiff should not be disturbed.

In *O'Reilly v. Sweeney* (1907) 54 Misc. 408, 105 N. Y. Supp. 1033, it was held that an action for breach of promise to marry
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could not be predicated on a promise of marriage made by one who had been judicially declared incompetent in lunacy proceedings, especially where, after restoration, there was no renewal or ratification.

J. T. W.

[ENGLISH DIVISIONAL COURT.]

INDIAN & GENERAL INVESTMENT TRUST, LIMITED,
v. BORAX CONSOLIDATED, LIMITED.

[1920] 1 K. B. 539.

Also Reported in 89 L. J. K. B. N. S. 252, 122 L. T. N. S. 547.

*Bonds — Loan to American company — Interest payable in London —
Right to deduct United States income tax.*

A railway company incorporated and carrying on business in the United States, which has issued bonds secured by a deed of trust by which it was agreed that the interest and principal should be payable in London, and that such deed of trust and the rights of all parties claiming thereunder should be regulated by the law of England, is not entitled to deduct from the sums it has agreed to pay for interest the amount which, under a subsequently enacted United States Income Tax Law, it is required to withhold from interest payable by it to foreign corporations.

(December 9, 1919.)

[540] ACTION tried by Sankey, J., without a jury.

By an indenture dated November 24, 1905, and made between the Tonopah & Tidewater Railroad Company (thereinafter referred to as the railroad company) of the first part, the defendants (thereinafter referred to as the Borax Company) of the second part, and the plaintiffs (thereinafter referred to as the trustees) of the third part, after reciting an indenture dated November 1, 1905, and made between the railroad company and the Mechanics Trust Company (thereinafter referred to as the trust company), and that the railroad company had determined to execute and issue first mortgage 5 per cent gold bonds redeemable at par on July 1, 1960, or prior thereto at 105 per cent to the amount of 500,000*l.*, and in order to secure the bonds to execute

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and deliver to the trust company as trustees a first mortgage or deed of trust of all its real and personal estate with all its franchises, the railroad company conveyed to the trust company all the property, real, personal, and franchises, mentioned in the indenture of November 1, 1905, to hold in trust for the benefit, security, and protection of the several persons and corporations who should from time to time hold and own the said bonds or any other bond or bonds issued in lieu thereof; and also reciting that it had been arranged for convenience that only one bond for the full sum of 500,000*l.* should be issued by the railroad company, but that the trustees should be entitled to require to be issued to them in lieu of such one bond such and so many bonds of an equivalent total value as they might require not exceeding 5,000 bonds in all, and reciting that it had been agreed that the bond should be dealt with in manner hereinafter appearing, and that the Borax Company should give such guaranty [541] in respect of the said bond and the interest thereon as was hereinafter contained, and also reciting that in pursuance of the agreement and for the purpose of securing the payment of the principal moneys and interest mentioned in the certificates to be issued as hereinafter mentioned the railroad company was about to issue to the present trustees (namely, the plaintiffs) one bond for the sum of 500,000*l.*, and that the railroad company had allotted to the subscribers thereof debenture stock certificates to the amount of 500,000*l.* against the bond, it was provided as follows:

Clause 4: "The railroad company shall duly pay and remit to the trustees in London the principal moneys, premiums and interest at 5 per cent secured by the said bonds so that the same respectively shall be in the hands of the trustees fifteen days before the dates on which the same respectively shall fall due and be payable, and the trustees shall apply the moneys received by them from the railroad company in respect of interest on the said bond or bonds in the first place in paying to the holders of the certificates interest at the rate of $4\frac{1}{2}$ per cent per annum on the amounts secured by the certificates held by them respectively. Such interest shall be paid to the holders of certificates on the 15th day of April and the 15th day of October in each year. And the trustees shall, after payment of interest at the rate of $4\frac{1}{2}$ per cent on the

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sums secured by the certificates for the time being outstanding, in the next place pay the balance of the said moneys received by them in respect of the interest on the said bond to the Borax Company."

Clause 8: "The Borax Company, in pursuance of the said agreement and in consideration of the payment to them of $\frac{1}{2}$ per cent per annum out of the interest at the rate of 5 per cent payable on the said bond or bonds, or the payment to them of the balance of the interest payable on the said bond or bonds in accordance with clause 4 hereof covenant with the trustees as follows:

"(A) If the railroad company shall make default in the fulfilment of any of the stipulations of clause 4 hereof they, the Borax Company, will pay to the trustees at the expiration of [542] seven days after demand in writing thereof shall have been made upon the Borax Company by or on behalf of the trustees the sum or sums of money in payment of which the railroad company shall have made default.

"(E) This covenant and guaranty shall be a continuing security, and shall remain in operation until the redemption or payment of the whole of the said bonds."

Clause 27: "These presents shall be construed and the rights of all persons claiming hereunder shall be regulated by the law of England. And the railroad company doth hereby agree that, in case it shall be necessary for the trustees to take legal proceedings against the railroad company in connection with these presents or for effectuating the security hereby created, it shall be lawful for the trustees to sue the company in England in its corporate name, and in order to give effect to the intention of the foregoing provision the railroad company hereby agrees to be bound in all things by the jurisdiction of the English courts, and the railroad company shall be deemed to have and at all times during the continuance of this security to retain domicile and residence in England, and that service of any writ of summons or other process issued at the suit of the trustees against the railroad company effected by leaving a copy of such writ or other process at the registered office for the time being of the Borax Company in London shall be deemed to be good and effectual service of such writ or other process upon the railroad company."

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By the Income Tax Act of the United States of America 1916, chap. 463 (as amended by the War Income Tax Act 1917, chap. 63), it was provided that an income tax at the rate of 2 per cent to be paid annually should be levied, assessed, and imposed upon the income received in the preceding year from all sources within the United States by every individual, a nonresident alien, including interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise; and also that there should be levied, assessed, and imposed an income tax to be paid annually at the rate of 2 per cent upon the net total income received in the preceding year from all sources within the United States by every corporation, [543] joint stock company, or association organized, authorized, or existing under the laws of any foreign country, including interest on bonds, notes, or other interest-bearing obligations of residents corporate or otherwise. The acts also contained provisions authorizing and requiring the said tax to be deducted and withheld and paid to the officers of the United States government authorized to receive the same from the income of nonresident alien individuals from sources within the United States, and the same provisions were made applicable to the tax imposed upon incomes derived from interest upon bonds and mortgages or deeds of trust or similar obligations of domestic or other resident corporations, joint stock companies or associations, by nonresident alien companies, corporations, and joint stock companies not engaged in business or trade within the United States, and not having any office or place of business therein.

The railroad company was a corporation incorporated under the laws of the State of New Jersey in the United States. Both the plaintiffs and the defendants were English corporations incorporated under the English Companies Acts.

On April 2, 1918, the railroad company or the defendants paid to the plaintiffs the sum of 11,025*l.* on account of the interest due on April 1, 1918, at the rate of 5 per cent on the sum of 500,000*l.*, the amount of the bonds.

By a letter dated April 9, 1918, the plaintiffs demanded from the defendants payment of the sum of 1,475*l.*, being the difference between the sum of 11,025*l.* and the sum of 12,500*l.*, being the interest at the rate of 5 per cent on the sum of 500,000*l.*

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The plaintiffs claimed to recover from the defendants the sum of 1,475*l.*, or alternatively the sum of 225*l.*, being the said sum of 1,475*l.* less 1,250*l.* repayable to the defendants by the plaintiffs in consideration and in the event of the performance by the defendants of their covenant contained in clause 8 (A) of the indenture of November 24, 1905.

The defendants, by their defense, alleged that the railroad company, being a corporation incorporated in America, was subject to and bound by the United States Income Tax Acts, [544] and was entitled thereunder to deduct and withhold tax at the rate of 2 per cent from the payment of interest at the rate of 5 per cent on the sum of 500,000*l.*, and that no further sum beyond the 11,025*l.* paid by the railroad company or by the defendants to the plaintiffs was payable by the railroad company or by the defendants to the plaintiffs. The defendants said that they were entitled to be paid and to retain the sum of 1,250*l.* out of the 12,500*l.*, and from the remaining sum of 11,250*l.* the railroad company and/or the defendants, who were guarantors only for the railroad company, were entitled to deduct or withhold and retain the sum of 225*l.*, being tax at 2 per cent in accordance with the Income Tax Laws of the United States.

Leslie Scott, K.C., and A. M. Latter, for the plaintiffs. The indenture of November 24, 1905, is an English contract as it was made in this country, and payment under it had to be made in London, and therefore it must be construed according to English law. The parties to the deed expressly provided in clause 27 that it should be construed, and the rights of all persons claiming under it should be regulated, by the law of England. That is conclusive on the point. The interpretation of a contract and the rights and obligations under it of the parties thereto must be determined in accordance with the law by which the parties to the contract intended, or may fairly be presumed to have intended, the contract to be governed. See Dicey's Conflict of Laws, 2d ed., rules 146, 152. In Story's Conflict of Laws, 8th ed. § 263, it is stated that "the law of the place of the contract is to govern as to the nature, the obligation, and the interpretation of the contract, *locus contractûs regit actum*." Lord Herschell, L.C., pointed out
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in *Hamlyn & Co. v. Talisker Distillery* [1894] A. C. 202, 208, 6 Reports, 188, 71 L. T. N. S. 1, 58 J. P. 540, that the place where the contract was made and the place where it was to be performed were both matters which must be taken into consideration, but neither of them was of itself conclusive as to the particular law which was intended to govern particular parts of the contract between the parties. [545] The whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract. Here it is clear from clause 27 of the contract that the parties intended that their rights under the contract should be governed by English law. A discharge of a contract not in accordance with the law by which the parties to the contract intended, or may fairly be presumed to have intended, the contract to be governed, is not a valid discharge. See Dicey's Conflict of Laws, rule 153. In Story's Conflict of Laws the rule is expressed in § 342 thus: "A discharge of a contract by the law of a place where the contract was not made, or to be performed, will not be a discharge of it in any other country." See *Smith v. Buchanan* (1800) 1 East, 6, 102 Eng. Reprint, 3, 5 Revised Rep. 499; *Gibbs v. Société des Métaux* (1890) 25 Q. B. D. 399, 59 L. J. Q. B. N. S. 510, 63 L. T. N. S. 503; *New Zealand Loan & Mercantile Agency Co. v. Morrison* [1898] A. C. 349, 67 L. J. P. C. N. S. 10, 77 L. T. N. S. 603, 5 Manson, 171, 14 Times L. R. 141, 46 Week. Rep. 239. The fact that one of the parties to the contract is of American domicile is immaterial. *Gibbs & Sons v. Société des Métaux, supra*. The fact that the American Income Tax Acts made the deduction of income tax from interest equivalent to payment to the person entitled to receive the interest is irrelevant, as the English courts do not recognize the fiscal laws of foreign countries as altering the position of parties to an English contract. The plea by the defendants of tender of the 5 per cent interest less the income tax imposed by the United States is a bad plea. The contract being made in England, the defendants are bound to perform it in its integrity, and it is no defense to say that a foreign power has intervened. See *Spiller v. Turner* [1897] 1 Ch. 911, 66 L. J. Ch. N. S. 435, 76 L. T. N. S. 622, 45 Week. Rep. 549; *Sydney* 10 B. R. C.

Municipal Council v. Bull [1909] 1 K. B. 7, 78 L. J. K. B. N. S. 45, 91 L. T. N. S. 805, 25 Times L. R. 6.

Finlay, K.C., and Bremner, for the defendants: The defendants are entitled to succeed. The railway company were under a duty to deduct and pay to the United States fiscal authorities, in accordance with the United States Income Tax Acts, income tax on bonds held outside the United States. A note in Dicey's Conflict of Laws, 2d ed. p. 554, is to the following effect: "*Jacobs v. Crédit Lyonnais* (1884) 12 Q. B. D. 589, 53 L. J. Q. B. N. S. 156, 50 L. T. N. S. 194, 32 Week. Rep. 761, 1 Eng. Rul. Cas. 338, suggests the [546] conclusion that an English contract to be performed in France, the performance whereof is, at the time when the contract is made, lawful by French law, may be valid in England, even though at the time for the fulfilment of the contract the performance thereof is forbidden by French law. This inference is suggested by the headnote to the report of *Jacobs v. Crédit Lyonnais*, *supra*, and by some expressions in the case, but is (it is submitted) erroneous. *Jacobs v. Crédit Lyonnais* only decides that a person who enters into an English contract—*i. e.*, a contract governed by the law of England—is not excused for its nonperformance in France by circumstances which take place after the contract is made, and afford a legal excuse for nonperformance under French, though not under English, law. It does not appear from the case that it would have been illegal under French law to have shipped the cargo, but only that the shipping was prevented by *force majeure*,—namely, by the action of the rebels. This hindrance was a valid excuse according to French law, but not according to English law; hence, in an English court, it could not be a valid defense for nonperformance of an English contract. If the shipment had been a violation of French law this would apparently have been a valid excuse in an English court for the non-shipment of the cargo,—*i. e.*, the nonperformance of the contract." That statement as to the law applies to the present case. If a contract is made in England the basis of which involves the doing of some act in a foreign country, and that act becomes either illegal by the law of that country, or the performance of which is permitted only upon the payment of a tax, then, even though the contract is an English contract, yet the performance of that part is

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excused which the foreign Legislature has either forbidden or has allowed its performance only upon payment of the tax. In *Delage v. Nugget Polish Co.* (1905) 92 L. T. N. S. 682, 21 Times L. R. 454, an English company undertook to pay to a foreigner residing abroad, from whom they had acquired a secret process, 8 per cent on the gross receipts from the sale for a number of years, and it was held that the company had rightly deducted income tax from the amounts payable under the agreement. [547] When money is lent to a company carrying on business in a foreign country, the lender runs the risk of being subject to the fiscal legislation of that country. It is true that the payments of interest had to be made in this country, but that obligation could only be carried out by sending money from the United States, and would be subject to the fiscal legislation of that country as a condition of remitting the money. If the plaintiffs had to go to the American courts to enforce payment of the interest the payment of the 5 per cent less tax would be held to be a good discharge. The substantive rights of the parties are not affected by clause 27. The English courts will have regard to the fact that the railway company is an American company, the defendants are merely guarantors, and that the money has to come from America and is subject to the fiscal legislation of the United States government. In *Spiller v. Turner* [1897] 1 Ch. 911, 66 L. J. Ch. N. S. 435, 76 L. T. N. S. 622, 45 Week. Rep. 549, an English company, with English stockholders, carried on business in Australia, but was not incorporated there, and therefore an English contract made between the company and its English stockholders could not be affected by Australian legislation. Those facts are very different from the present case, and therefore that case does not apply.

Leslie Scott, K.C., in reply. Sections 102 and 103 of the Income Tax Act 1842, expressly provide that a person who is liable to pay yearly interest of money may make a deduction therefrom in respect of income tax, and that such deduction shall be equivalent to payment and be a discharge *pro tanto*. Without that provision the deduction of income tax would not be equivalent to payment. There is no similar provision with regard to the deduction of foreign income tax.

The comment on *Jacobs v. Crédit Lyonnais* (1884) 12 Q. B. D. 10 B. R. C.

589, 53 L. J. Q. B. N. S. 156, 50 L. T. N. S. 194, 32 Week. Rep. 761, 1 Eng. Rul. Cas. 338, in the note on p. 554 of Dickey's Conflict of Laws goes further than the authorities warrant. In the other cases cited in the note the illegality affected both parties. Here there is no question as to illegality. *Delage v. Nugget Polish Co.* (1905) 92 L. T. N. S. 682, 21 Times L. R. 454, is distinguishable. If the 8 per cent of the gross receipts was [548] an annual payment within the Income Tax Acts, then the English courts were bound under § 103 of the Act of 1842 to enforce the deduction of income tax.

Cur. adv. vult.

Sankey, J., read the following judgment: In this case the plaintiffs advanced a sum of 500,000*l.* to an American railway company known as the Tonopah & Tidewater Railroad Company, who agreed to pay interest thereon in London at the rate of 5 per cent. The rights of the parties are regulated by an indenture dated the 24th day of November, 1905, made between the railroad company, the defendants, and the plaintiffs, in pursuance of which the defendants guaranteed the payment of the interest as follows: [His Lordship read clauses, 4, 8, and 27 of the deed of trust and continued:]

Subsequently, in the years 1916 and 1917 the United States of America passed certain income tax laws, and the point at issue in this case is whether the railroad company are entitled to deduct the amount they have paid for income tax to the United States government from the sums they agreed to pay to the plaintiffs for interest, it being contended on their behalf that the company was and is a corporation incorporated in America and subject to and bound by the said acts and entitled thereunder to deduct and withhold tax at the rate of 2 per cent from the payment of the interest mentioned.

No evidence was called before me, and the facts were not disputed, the question of liability alone being argued. It is only necessary to reiterate (1) that the contract and the rights of all persons claiming thereunder are to be regulated by the law of England; and (2) that the sum due for interest is payable in London.

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It was urged on behalf of the plaintiffs that they are entitled to succeed upon the ground that payment of the 5 per cent mentioned in the contract is not discharged by the payment to them of a smaller sum in England and payment of the balance to the United States of America taxing authorities.

Now it may be stated as a general proposition of English law [549] that an agreement by A to pay B a certain sum is not discharged by the payment to B of a sum of less amount and the payment to C of the balance, unless (1) this position is created by statute or common law, or (2) by stipulation express or implied between the parties.

As to (1). Is the position taken up by the defendants created by statute or common law? It is provided by §§ 102 and 103 of the English Income Tax Act of 1842, that where a person is under liability to pay yearly interest of money he may make a deduction therefrom in respect of income tax and "shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable." In other words there is an express act of Parliament which permits payment to the English income tax authorities to be a discharge *pro tanto* of the debt which a person owes in respect of yearly interest to another. There is no act of Parliament which allows payment of income tax to another country to be reckoned as a discharge.

As to the common law, as far back as 1800 it was laid down by Lord Kenyon, Ch. J., in *Smith v. Buchanan* (1800) 1 East, 6, 10, 102 Eng. Reprint, 3, that "it is impossible to say that a contract made in one country is to be governed by the laws of another." In that case it was held that a discharge in the state of Maryland under a commission of bankruptcy is not a bar to an action for a debt arising in England against the bankrupt by a creditor a subject of this country, for, as Lord Kenyon said, "it might as well be contended that if the State of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would have been bound by it." In Story's *Conflict of Laws*, 8th ed., p. 488, § 342, that learned author says: "A discharge of a contract by the law of a place where the con-

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tract was not made, or to be performed, will not be a discharge of it in any other country." In the case of *Spiller v. Turner* [1897] 1 Ch. 911, 66 L. J. Ch. N. S. 435, 76 L. T. N. S. 622, 45 Week. Rep. 549, the facts were as follows: An English company which carried on business in a colony [550] passed resolutions under which a class of guaranteed preference stockholders became entitled to a cumulative payment of interest at the rate of 6 per cent per annum in priority to the other stockholders. By a subsequent act of the colonial Legislature a duty, in the nature of income tax, was imposed on all dividends or interest paid out of assets in the colony to the members of companies carrying on business therein, and it was declared that the duty payable in respect of the amount received by any member should be a debt due by him to the Crown. It was held by Kekewich, J., that the contract between the preference and ordinary stockholders being an English contract, the rights under it of preference stockholders, not domiciled in the colony, were not affected by the colonial act, and that they were therefore entitled to their 6 per cent without any deduction in respect of the colonial duty.

The learned counsel for the defendants relied strongly upon a note in Professor Dicey's *Conflict of Laws*, 2d ed., p. 554, upon the well-known case of *Jacobs v. Crédit Lyonnais* (1884) 12 Q. B. D. 589, 53 L. J. Q. B. N. S. 156, 50 L. T. N. S. 194, 32 Week. Rep. 761, 1 Eng. Rul. Cas. 338. It is to be observed, however, that in that case different circumstances existed from those in the present case. There the contract was to be performed by shipment by a French company at an Algerian port, an operation which was lawful by French law at the time the contract was made, although at the time for the fulfilment of the contract the performance was forbidden by such law. No circumstances of that character exist in the present case, and different considerations apply. Whilst it is the duty of an English court to enforce an English taxing act, it is no part of its duty to enforce the taxing act of another country. I have therefore come to the conclusion that there is no statute and no principle of the common law which justifies the defendants in their refusal to pay.

As to (2). Is there any stipulation, express or implied, between the parties upon which the defendants can rely to justify

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the position they have taken up? "It is open in all cases for parties to make such agreement as they please as to [551] incorporating the provisions of any foreign law with their contracts. . . . If a contract made in England by English subjects or residents, and upon which payment is to be made in England, has to be performed in part abroad, it might not be unreasonable to assume that the mode in which any part of it has to be performed abroad was intended to be in accordance with the law of the foreign country, and to construe the contract as incorporating silently to that extent all provisions of a foreign law which would regulate the method of performance, and which were not inconsistent with the English contract." Per Bowen, L.J., in *Jacobs v. Crédit Lyonnais* (1884) 12 Q. B. D. 599, 604, 1 Eng. Rul. Cas. 338. Now admittedly there is no express stipulation, and in my view the court would not be justified in reading into this English contract an implication that the plaintiffs agreed that the provisions of an American taxing act should be enforceable against them in England. The implication is just the other way. The contract expressly provides that it shall be construed, and that the rights of all persons claiming thereunder shall be regulated, by the law of England. The railroad company agreed to be bound in all things by the jurisdiction of the English courts, and that service of the writ upon the defendants in London should be deemed to be good and effectual service of the writ upon the railroad company. It is impossible to hold that a contract so expressed impliedly incorporates a right in the railroad company to deduct American income tax from the sums they have agreed to pay in London in accordance with English law.

In my opinion the plaintiffs' contention is correct, and they are entitled to judgment.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Maddison, Stirling, and Humm.*

Solicitors for defendants: *Ashurst, Morris, Crisp & Company.*

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Note.—Liability of corporation to holder of bonds for amount of income tax which it is required by law to deduct from interest payments.

It will be noted that in the reported case (*INDIAN & G. INVEST. TRUST v. BORAX CONSOLIDATED*, *ante*, 108) where an American railway company borrowed money and issued 5 per cent gold bonds to the plaintiff, an English corporation, and the defendant, also an English company, joined in a deed of trust given by the railway guaranteeing the payment of the principal and interest in London, and providing that the deed should be construed and the rights of all parties thereunder be regulated by the laws of England, it was held that the railway company and the defendant were not entitled to deduct from the interest payable on the bonds the amount of an income tax imposed by the United States upon incomes derived by foreign corporations from interest on bonds of United States corporations, the court holding that the contract was an English one, and that there was no English statute, or principle of common law, justifying the deduction of the United States income tax from the interest, and the payment merely of the balance, and that there was no provision, express or implied, in the contract of the parties authorizing such a deduction.

The question under annotation is one of importance at the present time, and the decision in the reported case is of particular value, as there is little authority on the point.

In a somewhat similar case, *Spiller v. Turner* [1897] 1 Ch. 911, 66 L. J. Ch. N. S. 435, 76 L. T. N. S. 622, 45 Week. Rep. 549, where an English company carrying on business in Queensland, but never registered or incorporated there, in accordance with a resolution, issued preference stock guaranteed to bear 6 per cent interest, and subsequently the Queensland legislature passed an act imposing a certain duty on dividends and profits to be distributed, proportionate to the capital employed in the colony, and made the duty a debt due the Crown by one receiving a dividend without the duty having been deducted, it was held that the contract with the preference stockholders was an English contract, and that such stockholders had a right to insist on the performance of their contract, and that they were not affected by the Queensland act imposing the duty, but were entitled to the full 6 per cent interest guaranteed, and the company was not entitled to make any reduction in respect of the colonial tax.

There appear to be no other cases which have considered the point under annotation.

J. T. W.

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[ENGLISH DIVISIONAL COURT.]

GOLDFARB v. BARTLETT AND KREMER.

[1920] 1 K. B. 639.

Also Reported in 122 L. T. N. S. 588, [1920] W. N. 15, 64 Sol. Jo. 210.

Bill of exchange — Partnership — Dissolution — Notice of dishonor to continuing partner — Effect on retiring partner.

Where a bill drawn by partners is dishonored after the dissolution of the partnership, notice of dishonor to the continuing partner is sufficient notice to the retiring partner.

Partnership — Giving extension of time to continuing partner — Discharge of retiring partner.

Where, after the dissolution of a firm the indorsee of a bill of exchange drawn by the firm, with notice of dissolution and of the fact that the continuing partner has undertaken to discharge the firm debts, received from the continuing partner another bill of exchange payable at a later date, with a request that the first bill be not presented, but nevertheless presented the first bill for payment at its maturity, when it was dishonored, but failed to note or protest the second bill, which was likewise unpaid, the retiring partner is discharged from liability upon the first bill of exchange by the extension of time given to the continuing partner by taking the second bill, or from liability upon the consideration therefor by reason of such indorsee's failure to take the proper steps to realize his security under the second bill.

(December 18, 1919.)

TRIAL of action before McCardie, J.

[640] The action was brought upon a bill of exchange dated August 11, 1913, for 5,355 francs which had been drawn by the defendants upon and accepted by a French company, and which was indorsed by the defendants to the plaintiff. There was also an alternative claim for the consideration in respect of which the bill was given.

The following statement of facts is taken from the judgment:

The plaintiffs, a firm of S. Goldfarb, were bristle merchants carrying on business in London. The defendants, Bartlett & Kremer, were also bristle merchants, and formerly carried on business in partnership in London. Before August, 1913, there had been some dealings between the plaintiffs and the defendants, with the result that a substantial sum of money became due from

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the defendants to the plaintiffs. In August, 1913, the plaintiffs received from the defendants a bill of exchange dated May 23, 1913, for a sum of about 208*l.*, payable ninety days after sight, which was drawn by the defendants upon a French company called *Compagnie Générale d'Enterprises Publiques et Privées*, and accepted by that company, and which had been indorsed by the defendants to the plaintiffs for value. The plaintiffs discounted that bill with their bankers. The bill was dishonored and duly protested. Thereupon the defendants, on or about August 21, 1913, handed to the plaintiffs another bill of exchange for 5,355 francs dated August 11, 1913, payable sixty days after date,—that is, on or about October 11. The bill was in a similar form to the previous bill, being drawn by the defendants upon the same French company, accepted by that company, and then indorsed by the defendants to the plaintiffs for value. The bill was received by the plaintiffs while the partnership between the two defendants was in full force.

On August 27, 1913, shortly after the receipt of the bill by the plaintiffs, the partnership between the two defendants was dissolved. By the terms of the agreement of dissolution the business carried on by the partnership and all the assets belonging thereto from the date of the agreement belonged to the defendant Bartlett, who was alone entitled to use [641] the firm name of Bartlett, Kremer, & Company. Kremer went out of the business for a consideration which was paid to him. Clause 1 of the agreement provided that the partnership hitherto subsisting between Bartlett and Kremer should be determined as from the date of the agreement, and neither of the parties should be in any way authorized to incur liabilities on behalf of the other from the date thereof. It also provided that notice of the dissolution should be forthwith advertised in the *London Gazette* and notified to the customers and others who had dealt with the firm. By clause 4 Bartlett covenanted with Kremer that he would pay and discharge all debts and liabilities of the firm of Bartlett, Kremer, & Company, whether existing or future, and would indemnify Kremer from and against the same and from all claims and demands on account thereof.

Upon the execution of that agreement, notice of the dissolution
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of partnership was duly given to the plaintiffs by a letter dated August 27, which was signed by both Bartlett and Kremer, whereby they informed the plaintiffs that the partnership theretofore existing between them had been dissolved, and that the defendant Bartlett would carry on the business of Bartlett, Kremer, & Company alone under the same name, and that he would in due course discharge all the liabilities of the firm and receive all sums due to the firm. The plaintiffs wrote to the defendant Kremer on August 28 in reply to that notice of dissolution of partnership, and said that they had entered into certain obligations and had undertaken liability for both Kremer and Bartlett, and that they must continue to hold both jointly and severally liable for those obligations.

Shortly before October 11, 1913, when the bill of August 11 fell due, Bartlett, the continuing partner, saw the plaintiffs and offered them another bill in exchange for the one then current. The bill, which was offered and taken by the plaintiffs, was dated October 1, 1913, and was drawn by the defendant Bartlett in the name of Bartlett, Kremer, & Company upon the same French company as the other bills had been drawn upon, and accepted by that company, and indorsed [642] by Bartlett, Kremer, & Company, that is, by the defendant Bartlett, who was then carrying on business in that name, to the plaintiffs. The bill was for 5,890 francs, and was payable thirty days after date,—namely, on October 31, 1913. At the same time Bartlett asked the plaintiffs not to present the bill dated August 11 that was then current. As a matter of fact the bill of August 11 was presented and dishonored and was returned by the plaintiffs' bankers, with a slip attached showing that it had been presented and dishonored. Thereupon the plaintiffs saw Bartlett and gave him notice of dishonor. McCardie, J., held that a notice of dishonor within § 49 of the Bills of Exchange Act 1882 was duly given, and that all the proper formalities there required were followed.

The last bill, dated October 1, 1913, payable on October 31, was also not paid. It was, however, not noted or protested, and no notice of dishonor was given to the defendants.

There was nothing to show that the bills were accepted by the French company as accommodation bills, and McCardie, J., drew
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the inference from the facts before him that they were accepted for value.

The plaintiffs thereupon brought this action against both Bartlett and Kremer. The action was first brought in respect of the bill of exchange dated October 1, 1913. Afterwards the plaintiffs amended their writ, and sued in respect of the bill of exchange dated August 11, 1913; alternatively they sued for the debt in respect of which the bill was given.

The defendant Bartlett was not served with the writ, and he did not appear to defend the action. The defendant Kremer alone defended the action.

Powell, K.C., and Kenelm Preedy, for the plaintiffs. The defendant Kremer is liable to the plaintiffs upon the bill dated August 11, 1913, as it was indorsed to the plaintiffs by the firm of Bartlett, Kremer, & Company while the partnership between Kremer and Bartlett was still subsisting. A partner who retires from a firm does not thereby cease to be liable [643] for partnership debts or obligations incurred before his retirement. See § 17, subs. 2, of the Partnership Act 1890. When that bill was dishonored due notice of dishonor was given to the defendant Bartlett, and all the formalities required by the Bills of Exchange Act 1882 were duly observed. It is true that that notice was given after the dissolution of the partnership, but that is immaterial. It has been held by Channell, J., in an unreported case, that where a bill drawn by partners is dishonored after the dissolution of the partnership, notice to one partner is sufficient. See Chalmers' Bills of Exchange, 8th ed., p. 182. This is in accord with the New York Negotiable Instruments Law (L. 1909, chap. 43), § 170, which provides that "where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution." The headnote to *Willis v. Green* (1843) 5 Hill, 232, 40 Am. Dec. 351, states that "where two persons, not partners, indorse a note payable to their order, they cannot be made liable unless notice of nonpayment be given to each; though otherwise, if they be partners." Although there is no reported decision to the same effect in England there are dicta which point to that conclusion. Heath, J., in *Wood v. Brad-*
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dick (1808) 1 Taunt. 104, 105, 127 Eng. Reprint, 771, said "that when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past, the partnership continues, and always must continue." Patteson, J., in *Hills v. Thorowgood* (1836) 5 L. J. K. B. N. S. 214, 215, also said: "This bill was a partnership transaction, and if the partnership had been dissolved, the partners would each remain liable upon it, and the admission of one after the dissolution would be evidence against the other." Kremer, by the agreement of dissolution of partnership, left Bartlett to wind up the affairs of the partnership, and therefore Bartlett had authority under § 38 of the Partnership Act 1890, notwithstanding the dissolution of partnership, to bind the firm and the rights and obligations of Kremer so far as might be necessary to wind up the affairs of the partnership and to [644] complete transactions begun but unfinished at the time of the dissolution, and therefore he had authority to give the bill of October 1 instead of paying the bill of August 11, and the notice of dishonor that was given by the plaintiffs to Bartlett is a good notice as against Kremer, and he is accordingly liable on the bill.

Given, for the defendant Kremer. This defendant is not liable upon the bill of August 11, 1913, as no notice of dishonor was given to him. The notice of dishonor that was given by the plaintiffs to Bartlett is not a good notice of dishonor as against Kremer, as the partnership had been dissolved to the knowledge of the plaintiffs at the time the notice was given. Sect. 49, subs. 11, of the Bills of Exchange Act 1882, provides that "where there are two or more drawers or indorsers who are not partners, notice must be given to each of them." There is no authority for the proposition that the continuing partner after the dissolution of the partnership is the agent of the retiring partner to accept a notice of dishonor or a protest. The deduction to be drawn from the judgment of Lord Herschell in *Rouse v. Bradford Banking Co.* [1894] A. C. 586, 63 L. J. Ch. N. S. 890, 6 Reports, 349, 71 L. T. N. S. 522, 43 Week. Rep. 78, 21 Eng. Rul. Cas. 650, is that there is no such implied authority. By the agreement of dissolution of partnership it was agreed between Bartlett and Kremer that Bartlett should take over the liabilities of the partnership. **10 B. R. C.**

Notice of that agreement was given to the plaintiffs, and from that time Kremer became a surety only, instead of being a principal debtor, and the plaintiffs were bound to do nothing to prejudice his interest by giving time to the principal debtor, otherwise his liability as surety was discharged. *Rouse v. Bradford Banking Co.*, *supra*; Lindley on Partnership, 8th ed., p. 271. The plaintiffs knew that Kremer was only in the position of surety, and he is discharged by the plaintiffs' dealing with Bartlett after the dissolution of the partnership, as the taking by the plaintiffs of the bill of October 1 amounted to the giving of time to Bartlett. The plaintiffs knew that the partnership had been dissolved, and that Bartlett, Kremer, & Company was the name under which Bartlett traded. The [645] authority of Bartlett was to discharge the obligations of the partnership by meeting the bill of August 11, 1913. He had no authority to deal with the bill in any other way. Bartlett had no authority in winding up the affairs of the partnership to give the bill of October 1 so as to bind Kremer. *Kilgour v. Finlyson* (1789) 1 H. Bl. 155, 126 Eng. Reprint, 92. The plaintiffs, by taking the bill of October 1 from Bartlett and at the same time keeping the bill of August 11 in their hands, thereby gave time to Bartlett, because it amounted to an agreement that the bill of August 11 should not be enforced. Kremer, who was in the position of surety, was accordingly discharged from liability. *Gould v. Robson* (1807) 8 East, 576, 103 Eng. Reprint, 463, 9 Revised Rep. 498. The plaintiffs by failing to present the bill of October 1 for payment or, if it was dishonored, to give notice of dishonor, thereby discharged the other parties to the bill from liability on the bill of August 11 and also on the debt or other consideration for which the bill was given. *Soward v. Palmer* (1818) 8 Taunt. 277, 129 Eng. Reprint, 390, 2 J. B. Moore, 274, 19 Revised Rep. 515; *Peacock v. Purssell* (1863) 32 L. J. C. P. N. S. 266, 14 C. B. N. S. 728, 143 Eng. Reprint, 630, 10 Jur. N. S. 178, 8 L. T. N. S. 636, 11 Week. Rep. 834, 4 Eng. Rul. Cas. 526, and therefore Kremer is discharged from liability upon the earlier bill of August 11 for the discharge and payment of which the bill of October 1 was given and accepted.

Powell, K.C., in reply. If notice of dishonor might be given to
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Bartlett so as to bind Kremer, Bartlett might also waive the necessity for the giving of the notice so as to bind Kremer. The taking by the plaintiff of the bill of October 11 in no way prejudiced the rights of Kremer. In order that Kremer should be discharged from liability there must be novation of the debt, and there was no novation. The case of *Rouse v. Bradford Banking Co.* [1894] A. C. 586, 63 L. J. Ch. N. S. 890, 6 Reports, 349, 71 L. T. N. S. 522, 43 Week. Rep. 78, 21 Eng. Rul. Cas. 650, depended upon its own peculiar facts, and is no authority in the present case.

McCardie, J.: This case raises points of intricacy and commercial importance, and it has been most ably argued by counsel on both sides. [His Lordship stated the facts set out above, and continued:]

The first point that arises for decision is this. Mr. Givcen contended that no notice of dishonor of the bill dated [646] August 11, 1913, was in fact given to the defendant Kremer. That fact is correct, and the question therefore arises whether the notice of dishonor that was given by the plaintiffs to the defendant Bartlett after the dissolution of the partnership between him and Kremer in respect of a partnership bill of exchange given before the dissolution is a notice not only to Bartlett, but also to Kremer. That is a point of some practical importance.

Several sections of the Partnership Act 1890 may be briefly referred to. Sect. 16 provides that "notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner." That section *prima facie* refers to an existing operative partnership. Sect. 17, subs. 2, states that "a partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement." Incidentally I may also mention § 15, which says that "an admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm." That section also on the face of it refers to an existing operative partnership. Then comes a section of considerable importance. Sect. 38 provides that "after the disso-

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lution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise." Mr. Powell has relied upon that section, and claims that it is in consonance with the course of decided authority. I may also refer to § 49, subs. 11, of the Bills of Exchange Act 1882, which provides that "where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others." These are the only statutory provisions I need refer to. The question is therefore [647] whether a notice of dishonor given to a continuing partner after the dissolution of the partnership binds the partners who have retired from the partnership. There seems to be no express reported decision on the point, but there are certain authorities which seem to indicate that such a notice would bind the partner who has retired. There are observations by Mansfield, Ch. J., and Heath, J., in *Wood v. Braddick* (1808) 1 Taunt. 104, 127 Eng. Reprint, 771, 9 Revised Rep. 711, which, although not directly in point, still point to the conclusion that a retiring partner is bound by notice given to the continuing partner. There are similar observations by Patteson, J., in *Hills v. Thoroughgood* (1836) 5 L. J. K. B. N. S. 214, 2 Harr. & W. 102, and there also observations which point to the like result in *Willis v. Green* (1843) 5 Hill, 232, 40 Am. Dec. 351. In my view both convenience and principle support the conclusions indicated in the decisions to which I have referred. I find that the point has apparently arisen before, because it is stated in the notes to Chalmers' Bills of Exchange, 8th ed., p. 182, that notice to one partner after dissolution is sufficient, and an unreported decision of Channell, J., is cited as authority for the proposition. I think the decision of Channell, J., although unreported, is supported by the authorities already cited, and I hold that notice to one partner is adequate as notice to both the partners who had previously been carrying on business together in partnership. That is the first point in the case.

Mr. Givven has raised a number of other points and has argued
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them with great clearness and force. The next submission that he made was that, by reason of the notice of dissolution of partnership given to the plaintiffs on August 27, 1913, coupled with the actual dissolution created by the document of that date between the parties, the plaintiffs were fixed with notice that the defendant Kremer became a surety only as from the date of the dissolution. In support of that proposition he cited the case of *Rouse v. Bradford Banking Co.* [1894] A. C. 586, 63 L. J. Ch. N. S. 890, 6 Reports, 349, 71 L. T. N. S. 522, 43 Week. Rep. 78, 21 Eng. Rul. Cas. 650. In my opinion that submission is correct. The substance of the decision upon the legal principle involved is stated very clearly in the headnote, as follows: "Where [648] two or more are indebted as principals and it is afterwards agreed between them that as between themselves one shall be a surety only, and this agreement is made known to the creditor, the rule as to the discharge of a surety by giving time to the principal debtor applies." The result of that decision is that Kremer after August 27, 1913, was a surety only. Then arises a further submission by Mr. Giveen; namely, that Kremer has been discharged as surety by reason of several circumstances. The first circumstance relied upon by Mr. Giveen was that the plaintiffs after the dissolution of the partnership took from the defendant Bartlett a fresh bill of exchange,—namely, the bill dated October 1, 1913,—which became due on October 31, 1913, and which the plaintiffs received shortly before the date on which the bill of August 11, 1913, which is sued upon in this action, was dishonored. They did undoubtedly receive that bill, which was perfect in form and given for value. I observe that when this action was commenced the plaintiffs actually sued upon the bill of October 1, although they afterwards amended and sued upon the earlier bill dated August 11. The effect of the plaintiffs renewing the bill of August 11, in my opinion, was that the plaintiffs by necessary implication gave time to the defendant Bartlett in respect of the payment of the bill of August 11. They could not sue upon the two bills at the same time; the one excluded their remedy upon the other. While the second bill was running they could not, in my view, sue upon the earlier bill. In support of that contention Mr. Giveen cited *Gould v. Robson* 10 B. R. C.

(1807) 8 East, 576, 103 Eng. Reprint, 463, 9 Revised Rep. 498, which case I think amply supports the proposition he put forward. The position is correctly stated in Chalmers' Bills of Exchange, 8th ed. pp. 251-2, as follows: "The holder of a bill takes from the acceptor in lieu of payment a new bill payable at a future day, to which the drawer and indorsers are not parties. This discharges the drawer and indorsers." It matters not, in my opinion, in what way the giving of time is effected; whether it be by covenant not to sue for a given period, or whether it be by agreement not under seal not to sue for [649] a given period, or whether it be by accepting a new bill. The matter is clearly put by Rowlatt, J., in his work on Principal and Surety at p. 244, where he says: "It is immaterial what form the giving time takes, so long as there is a binding agreement by the creditor to suspend his rights. Thus, agreeing to take payment by instalments, taking a bill or note payable on a future day, or obtaining judgment by consent with a stay of execution beyond the date when in the regular course judgment could have been obtained, discharges the surety." In my view, therefore, the act of the plaintiffs in taking the bill of October 1 in the circumstances amounted to the giving of time to the defendant Bartlett, and therefore discharged the defendant Kremer, who was only in the position of a surety. If it had been necessary to do so I should have also accepted a further proposition of Mr. Givven to the effect that the conduct of the plaintiffs with regard to the bill of October 1 amounted to the destruction of the property they possessed, and to the benefit of which the surety was entitled. The plaintiffs did nothing in respect of that bill, and took no steps by way of realizing the assets they possessed. The result was that their rights against Kremer upon the bill of August 11 were entirely gone. For this proposition Mr. Givven cited *Soward v. Palmer* (1818) 8 Taunt. 277, 129 Eng. Reprint, 390, 2 J. B. Moore, 274, 19 Revised Rep. 515, and *Peacock v. Pursell* (1863) 32 L. J. C. P. N. S. 266, 14 C. B. N. S. 728, 143 Eng. Reprint, 630, 10 Jur. N. S. 178, 8 L. T. N. S. 636, 11-Week. Rep. 834, 4 Eng. Rul. Cas. 526. I think that those authorities show that not only is the remedy upon the earlier bill gone, but also that the right to sue upon the consideration for that earlier bill is likewise

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gone. Nowhere is this stated more clearly than in Leake on Contracts, 5th ed., at p. 635. It must be observed that the defendants were not the acceptors of the bill, but the drawers and indorsers, and therefore they were only secondarily liable. The way it is put in Leake is as follows: "If the debtor is only secondarily liable, as drawer or indorser, the delivery of the bill is a sufficient prima facie answer to the claim; and it lies upon the creditor to account for the nonpayment in a way to revive the liability of the debtor; for as holder of the bill he is bound to take all steps necessary to obtain payment and to preserve the rights of his [650] debtor upon it, as due presentment for payment and notice of dishonor; in default of which, where it is necessary, the latter is discharged not only from his liability upon the bill, but also from the original debt," and the appropriate authorities are cited in support of that proposition. I desire to add only one thing further; namely, that although I have held that one partner may receive after the dissolution of the partnership notice of dishonor that will bind the other partner, I have great doubt after hearing Mr. Giveen's argument whether the continuing partner has authority to waive the presentation of the bill or the protesting of the bill or notice of dishonor. That question will require further consideration when it arises for decision. The result is that there must be judgment for the defendant Kremer.

Judgment for defendant.

Solicitors for plaintiffs: *Sweepstone, Stone, Barber, & Ellis.*

Solicitor for the defendant Kremer: *Arthur S. Joseph.*

Note.—Notice, after dissolution, to one of former partners of dishonor of bill of exchange as notice to other partners.

It is generally held that where a bill of exchange, drawn or indorsed by a partnership, is dishonored after a dissolution of the firm, notice of protest given to one of the former partners is sufficient to bind all. *Coster v. Thomason* (1851) 19 Ala. 717; *Slocomb v. De Lizardi* (1869) 21 La. Ann. 355, 99 Am. Dec. 740; *Feigenspan v. McDonnell* (1909) 201 Mass. 341, 87 N. E. 624; *Dabney v. Stidger* (1840) 4 Smedes & M. 749; *Fourth Nat. Bank v. Heuschen* (1873) 52 Mo. 207; *Fourth Nat. Bank v. Altheimer* (1886) 91 Mo. 190, 3 S. W. 858; *Hubbard v. Matthews* (1873) 54 N. Y. 43, 10 B. R. C.

13 Am. Rep. 562; *Riddle v. McBeth* (1862) 2 Ohio Dec. Reprint, 606; *Burnet v. Howell* (1871) 8 Phila. 531; *GOLDFARB v. BARTLETT* (reported herewith) *ante*, 121.

But in *Cocke v. Bank of Tennessee* (1845) 6 Humph. 51, where a note was indorsed by a partnership which was subsequently dissolved by the death of a member, it was held that notice of dishonor, which was mailed, addressed to the former partnership, while binding on the firm effects in the hands of the surviving partner, was not binding on the deceased partner's estate in the hands of his administratrix.

The court in *Riddle v. McBeth*, *supra*, said: "Although a firm may be dissolved, it still continues, even as to third persons with notice, for the purpose of collecting and paying debts, and otherwise closing the concerns of the partnership. Thus in *Darling v. March* (1842) 22 Me. 184, Shepley, J., said: 'The dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle, and pay those before created. For these purposes each member has the same power as before the dissolution. If an account, existing before the dissolution, be presented to one of the former partners, he may decide whether it should be paid or not, even though it be a disputed claim. He may decide whether due notice had been given on negotiable paper, and may make or refuse payment accordingly. The waiver of demand and notice is but the modification of an existing liability, by dispensing with certain testimony which would otherwise be required. If one of the former partners could not dispense with the proofs, which might be required at the time of the dissolution, he could not liquidate the accounts and agree upon the balances. To waive demand and notice, and to settle accounts, is but to arrange the terms upon which an existing liability shall become perfect without further proof. In doing this, he does not make a new contract, but acts within the scope of a continuing authority.' . . . If a firm on its dissolution should authorize one of its members to settle their joint concerns, persons having notice thereof could, perhaps, settle and obtain a valid discharge of liability, only from such partner. But it would embarrass commercial transactions very much to hold that each member of a dissolved firm must have notice of protest of a bill during the continuance of the partnership. Secret or silent partners would thus escape liability. Although the holder of a bill might have notice of the dissolution, he might not be able to ascertain, suddenly, the individuals composing the indorsing firm at remote points,—at New York, Philadelphia, or Boston. Such notice would be utterly impracticable. When this firm indorsed this bill, all parties anticipated a notice to the firm served on one of its members; for that was all the law

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then required. Now, it is unjust to hold that a firm, or its members, may in such case acquire new rights by dissolving the partnership."

And in *Burnet v. Howell* (1871) 8 Phila. 531, it was held that notice of protest of a bill indorsed by a partnership given, without notice of the dissolution of the firm, to a retiring partner, was sufficient to bind liquidating partners who remained in possession of the firm assets. The court said: "It is well settled by all the authorities, that notice of protest to one of the members of a firm is sufficient to bind the firm. . . . But the defendants' counsel contend that the firm of Howell, Gilliland, & Company, having been dissolved prior to the maturity of the bill, that notice of protest should have been sent to Saml. Gilliland and James C. Gilliland, the liquidating members of the firm, and they not having received the notice of protest sent to M. T. Howell, until the 31st day of January, 1870, are discharged from all liability upon said bill. The plaintiffs, Burnet & Bickel, had been dealing with the firm of Howell, Gilliland, & Company some eighteen months before their dissolution, had sold them several bills of merchandise, and taken this bill in settlement of their account. In order that notice of the dissolution of the firm of Howell, Gilliland, & Company should have been brought home to the plaintiffs, and they be affected by the legal consequences flowing therefrom, it was incumbent upon the defendants to prove that the plaintiffs had actual notice of the dissolution. 'As to persons who have been in the habit of dealing with the firm, it is requisite that actual notice be brought home to them.' Collyer, Partn. § 533. . . . 'And though the partnership has been dissolved by mutual consent, notice to one of the members, if given before the fact of dissolution has been made public, is notice to all; for the partnership still subsists for the purpose of winding up the business and closing the concern, and each may be understood to act as the agent of the rest until notice of the dissolution has been made public.' Edwards, Bills & Notes, 631 and 632. There was no evidence adduced by the defendants to show that actual notice had been given to the plaintiffs of the dissolution of the firm, nor were such circumstances shown from which notice could be implied. We are therefore not called upon to decide what the legal effect would have been as to the liability of Samuel Gilliland and James C. Gilliland upon the bill, had such notice been proven, although some of the authorities, even after the dissolution of a firm, assert the doctrine that the dissolution operates as a revocation of all authority to make new contracts, but does not revoke the authority to arrange, liquidate, settle, and pay those before created. For these purposes each member has the same power as before the dissolution."

It will be noted that in the reported case (*GOLDFARB v. BART-*
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LETT, *ante*, 121) it was decided that notice to a continuing partner of dishonor of a bill of exchange, drawn by the partnership and indorsed to the plaintiff, was sufficient notice to a partner who retired shortly after the indorsement.

And in *Slocomb v. De Lizardi* (1869) 21 La. Ann. 355, 99 Am. Dec. 740, where a partnership had been dissolved by the death of one of the partners, it was held that notice of dishonor of notes indorsed by the firm should be given to the surviving partner, who was liquidator of the firm, and not to the personal representative of the deceased partner.

And in *Dabney v. Stidger* (1840) 4 Smedes & M. 749, a notice of nonpayment of a note, indorsed by a partnership, given after the death of one partner to the surviving partner, even with knowledge of the death of one of the firm, was held sufficient to bind the personal representative of the deceased.

In *Feigenspan v. McDonnell* (1909) 201 Mass. 341, 87 N. E. 624, it was held that under Rev. Laws, chap. 73, §§ 116, 122, 123, the terms of which do not appear, notice of dishonor of a note indorsed by a partnership, given to one partner, was sufficient notice to the other, although there had been a dissolution of the firm. J. T. W.

[ONTARIO APPELLATE DIVISION.]

GODFREY *v.* COOPER.

HART *v.* COOPER.

WARBURTON *v.* COOPER.

[46 Ont. L. Rep. 565.]

Automobile — Collision — Imputing negligence of driver to passenger.

The contributory negligence of the driver of an automobile "jitney" is not imputable to passengers therein so as to preclude them from recovering damages for injuries received in a collision resulting in part from defendant's negligence.

— Unlicensed driver — Status on highway.

The fact that the driver of a motor vehicle on the highway who is carrying passengers for hire has not obtained the license required by a statute enacting that "no person shall for hire . . . drive a motor vehicle on a highway" unless licensed, does not make him a trespasser upon the highway so as to preclude him or his passengers from recovering damages from another whose failure to give him the right of way, occasioned a collision.

Meredith, C.J. C.P., dissenting.

(January 2, 1920.)

APPEALS by the defendant in three actions in the County Court of the County of York from the judgment of Denton, Jun. Co. C.J., in favor of the plaintiffs.

The three plaintiffs were passengers in an automobile driven by one Flemming. Flemming was driving west along a highway, Dundas street, in the city of Toronto; the defendant was driving an automobile north on an intersecting highway, Hamilton street; Flemming had the right of way; the defendant ran into Flemming's car, striking it on the hub of one of its rear wheels. The plaintiffs were injured, and brought these actions to recover damages for their injuries.

The car driven by Flemming was owned by his wife. The three plaintiffs, the passengers, were being carried for hire. Flemming had no license.

The trial judge found the defendant negligent in failing to give Flemming the right of way and in driving negligently without keeping a proper lookout for vehicles ahead and to the right. He found Flemming negligent in driving at an excessive and unlawful rate of speed when approaching and crossing Hamilton street.

Upon these findings, an action by Flemming and by his wife, the owner of the automobile driven by Flemming; was dismissed; but judgment was given for each of the three above-named plaintiffs, upon the ground that they were not so identified with Flemming as to be answerable for his contributory negligence.

[567] The appeals were heard by Meredith, C.J. C.P., Riddell, Latchford, and Middleton, JJ.

O. H. King, for the appellant, contended that the plaintiffs and their car were unlawfully on the highway. Motor Vehicles Act, R.S.O. 1914, chap. 207, § 4, and § 18a, added by the amending Act 9, Geo. V. chap. 57, § 4. The plaintiffs could not maintain an action for negligence, for they had no right upon the highway at all. *Sercombe v. Township of Vaughan* (1919) 45 Ont. L. Rep. 142, 46 D.L.R. 131. The plaintiffs were trespassers upon the highway, they were identified with the driver, being in fact the cause of his unlawful act, and his negligence was theirs. *Roe v. Township of Wellesley* (1918) 43 Ont. L. Rep. 214; *Walker v. Township of Southwold* (1919) 46 Ont. L. Rep. 265, 50 D.L.R. 176.

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D. J. Coffey, for the plaintiffs, respondents, contended that the motor car had a right to be on the highway, and that the driver had a right to drive it, though he may not have been licensed to drive it for hire. The respondents could not be made responsible for the driver's failure to procure a license. That could not be the meaning of the statute as amended; if it were, any person taking passage in a "jitney" during a car strike must be satisfied before entering the car that the driver is licensed.

Riddell, J.: The facts in these cases as found by the learned county court judge, I accept. The plaintiffs were riding in a "jitney" driven by one Flemming, when there was a collision between their "jitney" and another automobile driven by the defendant. Both the defendant and Flemming were negligent, and the negligence of each contributed to the accident. Flemming was not the owner of the jitney, and he had no license as required by our statute.

Under these circumstances, the learned county court judge dismissed the action of Flemming, and gave judgment for these three plaintiffs—the defendant appeals.

The findings of fact were not attacked before us,—nor, as I think, can they be successfully attacked,—but it was argued that the plaintiffs were in a conveyance which had no right on the highway at all, and therefore the defendant is excused.

I do not discuss the question as to the right of the "jitney" on the highway. I assume that it was wrongfully there—one [568] question then is, What is the duty of one lawfully traveling upon the highway towards one unlawfully traveling on the same highway? The answer is, in my view, plain.

In the first place it has little or nothing in common with the duty of the owner of property toward those who come upon it, and such cases as *Sercombe v. Township of Vaughan* (1919) 45 Ont. L. Rep. 142, 46 D.L.R. 131, do not assist. We have two persons, members of the public, using a highway intended for public use; is one of them to gauge his conduct toward the other by the fact that that other has or has not a license? Are his duties to that other to be tested by something of which the first might, and probably would, be ignorant?

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In *Philadelphia, Wilmington and Baltimore R. Co. v. Philadelphia and Havre de Grace Steam Towboat Co.* (1859) 23 How. 209, 16 L. ed. 433, the defendants placed and left a pile in the Susquehanna river, a common and public highway; the plaintiffs' steamboat, prosecuting her voyage on the river, on Sunday, struck the pile and was damaged. The district court gave judgment for the plaintiffs; the judgment was affirmed by the circuit court; and the defendants appealed to the Supreme Court of the United States. The defense was that the boat had no right on the river on Sunday at all, as this was forbidden by a Maryland statute. The Supreme Court said that, admitting that the master and crew were liable to prosecution and punishment, that did not relieve the defendants. "The law relating to the observance of Sunday defines a duty of a citizen to the State. . . . For a breach of this duty he is liable to the fine or penalty imposed by the statute, and nothing more. Courts of justice have no power to add to this penalty the loss of a ship, by the tortious conduct of another. . . ." (p. 218.)

The court recognized the rule in Massachusetts (referred to on the argument) to the contrary, but said that it depended "on the peculiar legislation and customs of that State, more than on any general principles of justice or law."

In *Bucher v. Cheshire R. Co.* (1888) 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974, the same court held that the decisions established a local rule of law within the courts of Massachusetts, though this rule was disapproved by the court itself.

The true rule is well expressed in *Mohney v. Cook* (1885) 26 Pa. [569] 342, at pp. 349, 350, 67 Am. Dec. 419: "The law requiring care in avoiding accidents defines a duty to individuals only. It is most frequently applied to travel upon highways of land or water; though it applies to all cases in which persons are so near together that they are liable to injure each other by accident. It recognizes the relation thus naturally arising, and declares the law of that relation to be mutual care. The rule that the party who sues must be without fault himself has no other object than to prevent such fault, in circumstances of danger, as may contribute to the injury. . . . It is relevant to inquire whether the plaintiff, with due care, might not have avoided the injury."

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. . . It must be a failure of duty . . . to the party who caused the danger, so that it may be said that he brought the injury on himself."

In the Irish case, *Petrie v. Owners of S.S. "Rostrevor"* [1898] 2 Ir. 556, the plaintiff had without right planted oysters on the bed of the Newry river; the defendants' steamer had damaged the oyster beds; and the plaintiff brought an action based upon the alleged negligence of the defendants. The court (Johnson, J.) gave judgment for the plaintiff, holding that he was *de facto* in possession of the *locus in quo*, and that the defendants "ought . . . with ordinary skill and prudence" to have kept away from his oyster beds—the defendants appealed. In the Court of Appeal there was considerable discussion as to the duty of the defendants toward the plaintiff, who was undoubtedly a trespasser on the bed of the river. It was there held that the plaintiff was not in possession in any proper legal sense—that the defendant "was bound . . . not to be reckless or careless," but "fairly avoiding, as far as he could, any reckless, negligent, or careless action that might be detrimental or dangerous to the oysters." Per Lord Ashbourne, C., at p. 570. It was held, however, that the defendants had not acted in such a way as, "on the score of negligence, carelessness, or recklessness, to fix the ship with liability." *Ib.*, p. 570. Fitzgibbon, L.J., says (p. 574): "No action of trespass on the case for negligence could . . . be maintained by the present plaintiff, unless knowledge of the existence of his oysters, or such reasonable probability of their being in the place as would make it the duty of the defendant to act as if he knew that they were there, could be shown, *i. e.*, unless damage to the oysters was the natural or probable consequence of running [570] ashore;" and, while it is true that the Lord Justice says (p. 575) that the defendants owed no duty in point of law to the plaintiff, the reason is given immediately before in the fact that the defendants did not know of the existence of the beds, "the plaintiff . . . had not given any visible sign that his oysters were there" (p. 574)—concluding the Lord Justice says: "The evidence . . . fails . . . to support the action for negligence" (p. 582). Holmes, L.J., says (p. 585): "No doubt if the master knew of the oyster bed, he would not have been justified

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in injuring it through recklessness or carelessness." Of course the whole discussion was on the theory that the plaintiff had no right to have his oyster beds there; if he had such right he would have been in possession, and the defendants must keep off, knowledge or no knowledge.

There are a number of hints in the English courts—I think it will be sufficient to cite one actual decision. In *Walton v. Vanguard Motorbus Co. Limited* [1908] 25 Times L. R. 14, there were lamps of the plaintiffs placed without legal warrant on the footpath. The defendants' servants negligently ran against them and damaged them. It was argued that, even if the defendants were negligent, "the plaintiffs were not entitled to recover because they had not any right to erect the standards in the footpath." The county court judge held the defense valid, and the plaintiffs appealed to a divisional court. Lord Alverstone, L.C.J., "as regarded the point that the plaintiffs were not entitled to recover because they had not shown that they had any right to have the standard on the footpath . . . was of opinion that the defendants were not entitled to raise the point that the lamp-post was an object they were entitled to knock down without being held liable for negligence." In one of the cases there was evidence of negligence, and it was sent back for a new trial; in the other the county court judge had found that there was no negligence, and the appeal was dismissed.

This case does not seem ever to have been overruled or questioned.

As to the negligence of Flemming, it is too late in the day to advance that as a reason for disentitling his innocent passengers to recover.

The Bernina Case, Mills v. Armstrong (1888) L. R. 13 App. Cas. 1, 57 L. J. Prob. N. S. 65, 58 L. T. N. S. 423, 36 Week. Rep. 870, 6 Asp. Mar. L. Cas. 257, 52 J. P. 212, is still good law, and it is unnecessary to cite our own cases.

I would dismiss the appeal, with costs.

[571] Middleton, J.: Appeal by the defendant in three actions arising out of an automobile accident, heard by Judge Denton in the County Court of the County of York.

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The three plaintiffs were passengers in an automobile driven by one Flemming.

Flemming was driving west on Dundas street, the defendant was going north on Hamilton street, and so Flemming had the right of way. The defendant ran into Flemming's car, striking it on the hub of its rear wheel.

The trial judge has found the defendant negligent in failing to give Flemming the right of way and in driving negligently without keeping a proper watch for traffic ahead and to the right. He has also found Flemming negligent in driving at an excessive and unlawful speed when approaching and crossing Hamilton street.

Upon these findings, an action by Flemming and by his wife, the owner of the car, was dismissed; but judgment was given for the passengers, upon the ground that they were not so identified with Flemming as to be answerable for his contributing negligence.

Upon this appeal the findings of the judge as to negligence were not questioned by either party; the only question argued was the contention of the defendant, which the trial judge thought afforded no defense to the action by the passengers, that, as the car driven by Flemming was owned by his wife, a license was necessary; and that, as Flemming had no license, the passengers in his car could not recover against the defendant for injuries sustained by his negligence—put in another way, the contention is that Flemming in driving the car for hire was unlawfully upon the highway, and the passengers, by participating in his illegal act, became unlawfully upon the highway, and the negligence of the defendant resulting in their injury affords them no right of action.

I disagree with every element of this contention. In my opinion a mere failure to obtain a license does not deprive the driver of any right of action he would otherwise have against any person who injures him by negligence. Nor can a defendant rely upon any breach of the provisions of the statute, unless he can show that the breach of the statute was a proximate cause of the accident. Nor can any such defense avail against a passenger in the car. He is not so identified with the driver as to be disentitled to recover by the fault of the driver.

[572] The question is very widely different from that which arises in an action against the municipality for damages by rea-

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son of the nonrepair of a highway. There there is no wrongful act resulting in injury, but a mere failure to perform a statutory duty; and, before the plaintiff can succeed, he must show that the defendants owed a duty to him, and he fails in this when it appears that by reason of some fact he is not lawfully upon the highway. The obligation to repair a highway is an obligation to those lawfully upon the highway. An example of the application of this principle is found in *Sercombe v. Township of Vaughan* (1919) 45 Ont. L. Rep. 142, 46 D. L. R. 131.

The doctrine relied upon by the defendant has the assent of the courts of Massachusetts. The courts there fully appreciated the distinction between "unlawful conduct which is a cause of an injury and that which is a mere condition of it," and recognize that in other jurisdictions the doctrine has been established "that if there is an unlawful element in an act, which in a broad sense may be said to make the act unlawful, this will not preclude recovery unless the unlawful element or quality of the act contributed to the injury, so that, if the act of a plaintiff may be considered apart from a certain unlawful quality that may enter into it, and if so considered there is nothing in it to preclude recovery, the existence of the unlawful quality is of no consequence unless in some way it had a tendency to cause the injury." This doctrine, having the assent of almost every State of the Union, is repudiated in Massachusetts, where it is regarded as established that "the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. Everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law. In going along the way and entering upon the crossing" (i.e., the railway crossing where the defendants' engine negligently wrecked the automobile) "the machine is an outlaw. The operator, in running it there and thus bringing it into collision with the locomotive engine, is guilty of conduct which is permeated in every part by his disobedience of the law, and which directly contributes to the injury by bringing the machine into collision with the engine. He is within the words of the statute. He is in no better position to recover than a person would be who was violating the law by walking on the track of a railroad, and was [573] struck by an engine
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when he had reached the crossing of a highway. Every minute of the time, and in every part of his movement, while walking upon the track in his approach to the crossing, he would be a violator of the law and a trespasser. His unlawful act, in walking to that point and thus coming into collision with the engine, would directly contribute to his injury, and would preclude him from recovery." *Chase v. New York Central and Hudson River R. R. Co.* (1911) 208 Mass. 137, 158, 94 N. E. 377.

This and numerous other decisions show that in that State the automobile, if registered, and "all its occupants, are trespassers upon the highway and have no rights against other travelers except to be protected from reckless or wanton injury" (*Dean v. Boston Elev. R. W. Co.* (1914) 217 Mass. 495, 498, 105 N. E. 616), and it logically follows that a person injured by an unregistered car "can recover damages in an action against the operating owner without proving that he was negligent in operating the car, his liability being that of a wrongdoer maintaining a nuisance on the highway." *Koonovsky v. Quellette* (1917) 226 Mass. 474, 475, 116 N. E. 243, Ann. Cas. 1918B, 1146 (head-note). It is to be observed that, even in the State of Massachusetts, the unregistered automobile is not *caput lupinum*, but has some rights. The effect of the lack of registration is supposed to flow from the provisions of the statute, which is said to place the unregistered vehicle and its occupants in the position of trespassers, with the same right which a trespasser upon land has against the owner of the land. This effect is attributed to the provision of the statute that no automobile shall be operated on the streets unless registered.

Our statute is not so worded. Its main provision is: "The owner of every motor vehicle driven on a highway" shall obtain a license. Motor Vehicles Act, R. S. L. 1914, chap. 207, § 3. "Every motor vehicle shall be equipped with an alarm bell, gong, or horn." § 6 (1). And offenses against the act are made punishable by fine and imprisonment. § 24. The section here invoked (§ 4) is expressed in the negative form: "No person shall, for hire, pay or gain, drive a motor vehicle on a highway," unless licensed; but the whole scope of the act indicated that it is intended to require those operating vehicles upon the highway to

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observe its requirements, and failure to do so subjects the offender to certain penalties, but does not make him a trespasser in the sense that he is an "outlaw" within the meaning of the Massachusetts cases.

[574] The statute is intended, above all, to regulate the user of the highway, and to impose duties upon all those using motor vehicles upon the highway, and to confer corresponding rights upon all others using the highway. Speed limits are given, but there is the provision: "Any person who drives a motor vehicle on a highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances, including the nature, condition, and use of the highway, and the amount of traffic which actually is at the time, or which might reasonably be expected to be on the highway, shall be guilty of an offense under this act." § 11 (2). It is for breach of this duty that Flemming was found by the learned trial judge to be in fault.

The provisions as to right of way are intended to apply to all vehicles upon the highway, and not merely to those which have been duly registered, and which are in all respects in conformity with the requirements of the act. When vehicles are in operation upon the highway, the Legislature never intended any investigation or discussion as to registration, but prompt and instant obedience to the rules laid down.

Further, I can find no English law to justify the proposition that the rule laid down as to the obligation of owners of land to trespassers can be applied to highway accidents.

In *Walton v. Vanguard Motorbus Co.* [1908] 25 Times L. R. 14, the defendants' omnibus ran into a lamp standard placed by the plaintiff upon a footpath. The defendants maintained that the standard was not lawfully erected, and that the plaintiff was a trespasser. The Lord Chief Justice of England (Lord Alverstone) said: "The defendants were not entitled to raise the point that the lamp-post was an object they were entitled to knock down without being held liable for negligence."

When the foundation of the doctrine as to the right of a trespasser is looked at, it will be seen that it is rested upon the right of the owner to do as he pleases upon his own property, assum-

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ing that no one will violate his property right, and that the limitation is that he must not wilfully injure one who he knows is trespassing. *Grand Trunk R. W. Co. of Canada v. Barnett* [1911] A. C. 361, 80 L. J. P. C. N. S. 117, 104 L. T. N. S. 362, 27 Times L. R. 359, 48 Scot. L. R. 1092, 21 Ann. Cas. 694, was dealt with on the footing that Barnett was a trespasser not only upon the Pere Marquette Railway train, but also upon the land of the Grand Trunk Railway Company, and so "the railway [575] company was undoubtedly under a duty to the plaintiff not wilfully to injure him; they were not entitled, unnecessarily and knowingly, to increase the normal risk by deliberately placing unexpected dangers in his way" (p. 369). There is no duty owing by the owner of the land to a trespasser save this limited duty. This standard cannot be applied to persons using the highway, for there is upon them the common-law duty to care for others; and, in the case of motor vehicles, there is the duty to observe all the requirements of the statute. The existence of this duty shows how inapplicable the suggested principle is.

Finally, as already said, the passenger is not so identified with the driver of the vehicle as to be answerable for his fault. *Mills v. Armstrong, The Bernina* (1888) 13 App. Cas. 1, 57 L. J. Prob. N. S. 65, 58 L. T. N. S. 423, 36 Week. Rep. 870, 6 Asp. Mar. L. Cas. 257, 52 J. P. 212. This view has been acted upon by Anglin, J., in *Fafard v. City of Quebec* (1917) 55 Can. S. C. 615, 39 D. L. R. 717, at p. 723, where he held that a passenger in a cab was not called upon to inquire into the fact of the cabman's license.

Latchford, J., agreed with Middleton, J.

Meredith, C.J.C.P. (dissenting): The rights of the parties to these actions seem to me to depend entirely upon the question, whether the driver of the car in which the plaintiffs were when injured had, under § 2 of chap. 48, 7 Geo. V. (O.)*, "the right of

* By § 2, the Highway Travel Act, R. S. O. 1914, chap. 206, § 3, was amended by adding subsec. (3): "Where a person traveling or being upon a highway in charge of a vehicle or on horseback, meets another vehicle or person on horseback at a crossroad or intersection, the vehicle or horseman to the right hand of the other vehicle or horseman shall have the right of way."

way," over the person in charge of the vehicle which was the cause of the injury.

If he had, there is no reason that I can perceive, why the owner of the vehicle which caused the injury should not be liable for all the damages caused by the collision.

But, if he had not, neither he nor any of the plaintiffs has, in my judgment, any cause of action against the defendant.

If he had, he was right in proceeding as he did, including the increasing of the speed of his car.

According to his own testimony, upon seeing the other car on his left-hand side, and depending on his right of way, he went on without looking again at it; and in that he was right; for, being assured of his safety from it, under this statutory rule of the road, [576] his proper course was to exercise his right of way as speedily as possible, taking care that in doing so he was not running into danger from, or to, the traffic ahead of him; and, having made sure of no danger ahead, the increasing of his speed was not only proper, but commendable.

His testimony at the trial, and upon his examination for discovery before trial, makes it quite plain that he proceeded in this, under ordinary circumstances, proper and commendable manner. His own words are: "Well, I did not look at him after I first saw him; I looked straight right the other way to see where I was going,—to see what I was doing; I don't know anything about his car,—after I saw him, I just looked straight ahead." And, in answer to the question, "Did you increase your speed when you came to Hamilton street?" he said: "Well, I may have to shoot past him, I could not say;" and, "Yes, I may have, I am not sure." There seems to me to be no doubt he did, nor any doubt that in doing so he did that which every good driver would have done in the like circumstances, and should have done, if he had the right of way.

And, if he had the right to be upon the highway at all, as he was, he obviously should have had it, for he was going westward and the other car northward; the enactment which is in these words: "Where a person traveling or being upon a highway in charge of a vehicle . . . meets another vehicle . . . at a crossroad or intersection, the vehicle . . . to the right hand

of the other vehicle . . . shall have the right of way," makes that very plain.

But, unfortunately for the plaintiffs, their driver was not lawfully upon the highway. He was driving a motor vehicle for hire upon a highway without being licensed to do so, in violation of the provisions of § 4 of the Motor Vehicles Act—as he frankly admitted in his testimony at the trial, thus: "Q. You were driving this car for hire as a jitney? A. Yes, I had it for hire."

Being prohibited on one page of the statute book from being upon the highway at all, as he was, it would be out of the question to contend that, upon another page of it, he is not only given a right to be there, as he was, but is also given a right of way over others lawfully there.

And, if he had not the right of way, then the accident is altogether the result of his mistake. In the belief that he had, he [577] went on regardless of the rights of the other driver, and without taking any care to avoid a collision with him, not even looking again after first seeing the other car. Not having the right of way, he should not have increased the speed of his car, but rather should have decreased it. If he had not the statutory right of way, even if lawfully upon the highway, that would have been so. The other car should have had the right, because, proceeding as they were, the other car should have passed over safely first. At the rate of 20 miles an hour, one second in time would have made that sure, and much more than a second was lost to the other car by the application of its breaks and the acceleration of the speed of this car. And, even if that were not so, no one in his senses, driving a light car carrying four passengers, some of them young women, would have risked a collision with a heavy, rapid-running car, with only the driver of it in it; if the speed of this car had not been increased nor that of the other vehicle, the other would have passed over safely first; if it had been diminished, safety was more then assured.

The learned county court judge seems to have been much impressed with the thought that each of these cars was being driven too fast, and found that each driver was guilty of negligence in this respect; though there is really no evidence that either exceeded the statutory limit of 20 miles an hour. I can find no evi-

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dence of negligence, of the one toward the other, in this respect; and, if there had been, that neither caused nor contributed to the collision.

It must be remembered that though to the pedestrian, in whose ranks most of us are, high speed is dangerous, yet in much traffic it is not only necessary, but is, with competent driving, a factor of safety. Incompetence, hesitation, disregard of the rules of the road, and the rights of others, and negligence, are the main causes of injury and inconvenience.

In this case, if the driver of the car in which the plaintiffs were had gone one twentieth of a second faster his car would have escaped injury altogether. He complained of the other driver, because, if he had turned only a foot and a half to the right his car would have passed behind the other, but he did not; his brakes were on so firmly that he could not,—on so firmly in order to prevent his car from striking the other with destructive force; and, even if that had not been so, in imminent danger it is frequently impossible, [578] in a moment of time, to know and to do that which might have been best.

The real, and indeed the sole, cause of the injury which the plaintiffs sustained was the insistence of the driver of the car in which they were, upon a right of way to which he was not entitled: and so the plaintiffs have no cause of action against the defendant.

I have dealt with this question first because it is the first raised by this appeal; the trial judge based his judgment for the plaintiffs mainly upon the ground that the defendant proceeded in violation of the statutory right of way of the other car; if he were right in that, his judgment in favor of the plaintiffs was right; if he were wrong in it, the judgment is wrong; the appeal is based on the ground that the plaintiffs and the driver of their car were all unlawfully on the highway, and, being so, could have no such right of way; and so the judgment in appeal is wrong.

And, if that were not so, the action should be dismissed, in my opinion, upon the other, and broader, ground on which this appeal is based.

The driver of the car in which the plaintiffs were was driving in defiance of the statutory prohibition to which I have referred.

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He was unlawfully driving upon the highway. And that unlawful state of affairs was caused by the plaintiffs. They hired and paid, or were to pay, him for so driving. If they had not done so, he would have been lawfully upon the highway; would have had the right of way; and should have succeeded in his action for damages against the defendant. It was their presence in his car, as paying passengers, that alone made the journey unlawful.

It is no answer to assert that they did not know that the driver was not licensed, because, in the first place, it was their act alone that made his driving unlawful. When one employs and pays another to do an unlawful act it is not a good plea of justification to allege a want of knowledge of a want of qualification. In the next place, I find no evidence of ignorance of the plaintiffs that the driver was unlicensed, and, if there had been and such ignorance might excuse, it could not in this case excuse, because the plaintiffs did not take the trouble even to ask the man if he were licensed; if they had done so, he would have told them that he was not; but that would have made no difference; they would have taken their chances, and quite reasonably have done so, there being no other means by which they could be carried into town, whither [579] they were bound on pleasure bent. The risk of such an accident was very remote. Hundreds of thousands of other persons took it successfully during the "strike" of the street railway company's traffic servants. And, lastly, they knew, it was common knowledge, that thousands of private conveyances were unlawfully engaged in the like traffic; the licensed drivers were insignificantly few; the car was a "small Ford;" there was nothing of any character to indicate that it was a licensed mode of conveyance; they paid almost what they chose, and so small an amount that a licensed conveyance was out of the question.

The plaintiffs then were, at their own instance and at their own cost, being unlawfully driven upon the highway; they were trespassers upon the rights of others lawfully upon it, in so far as they interfered with traffic rights; and so, though those lawfully upon the highway could not disregard altogether the plaintiffs' presence there, their duty towards them was much less than if they had been lawfully there; they could not wilfully or recklessly disregard their presence there, and, so doing, injure them

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without liability; but they owed to them no higher duty; if they did, then these wrongdoers would be in as favorable a position as if they were rightdoers, and that cannot be. But there was nothing of that character in this case; until the driver of the car in which the plaintiffs were increased his speed, the driver of the other car might have thought, not unreasonably, that he was to be permitted to pass over first; indeed, if he had gone on notwithstanding the increased speed of the other car, he must have passed over safely first; for, as I have said, one second in time would have been enough, and more than that was lost in the sharp application of the brakes of his car, which must have been effective, as the large car which had been traveling at probably 20 miles an hour pushed the small car over only 4 or 5 feet, turning it over on its side, but causing it so little injury that its driver was able, at once, to drive it into and through the center of the city of Toronto to the wharf and there take in a passenger,—his wife,—and drive again through that city to their home. See *Grand Trunk R. W. Co. of Canada v. Barnett* [1911] A. C. 361, 80 L. J. P. C. N. S. 117, 104 L. T. N. S. 362, 27 Times L. R. 359, 48 Scot. L. R. 1092, 21 Ann. Cas. 694.

The case of *Sercombe v. Township of Vaughan* (1919) 45 Ont. L. Rép. 142, 46 D. L. R. 131, is also an authority for the views which I have expressed. The plaintiff failed in that action because he was [580] unlawfully upon the highway; if unlawfully there as to those whose duty it was to repair it for the benefit of those lawfully upon it—those having the highest rights in it—he was more unlawfully there as to them—those lawfully using it. In short, everyone making an improper use of a highway to the inconvenience of those lawfully upon it creates a public nuisance, and is liable to prosecution in so far as the public generally are concerned and answerable in damages to any person rightfully there who suffers any particular injury through such nuisance.

In that case, one of the learned judges said that the plaintiff was a trespasser upon the highway, a trespasser to whom the defendants owed no duty except to refrain from setting traps for him and from maliciously or wilfully injuring him; if that be so as to those who are by law to repair the highways for the use and benefit of those who rightfully make use of them, it must assuredly
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ly apply with greater force to those for whom the work must be done, when they are lawfully upon the highway. See *Jones v. Canadian Pacific R. W. Co.* (1913) 30 Ont. L. Rep. 331, 13 D. L. R. 900, reversing (1912) 3 Ont. Week. N. 1404, 5 D. L. R. 332.

Cases of the Bernina type I should have thought were obviously so unlike such a case as this that they could hardly be relied upon by either party. The Bernina was lawfully upon the highway, having all the rights which navigation laws afforded such a vessel; the little Ford in this case was unlawfully upon the highway; the passenger upon the Bernina was not in the remotest manner connected with any unlawful or negligent act; the passengers in the little Ford were the cause of its being unlawfully upon the highway; they hired its driver to do, and paid for doing, that which the statute said should not be done, and so deprived the car of the right of way the attempt to exercise which was the cause of the accident.

The statutory prohibition was passed for the benefit of those lawfully upon the highway,—for their safety, benefit, and convenience,—a benefit which the courts have no right to cut down, nor to speak of putting the wrongdoer in the same position in all respects as those having the highest rights in the highway, notwithstanding such prohibition, as the judgment in appeal does. See the *Jones Case*, *supra*.

Appeal dismissed (Meredith, C.J.C.P., dissenting).

Note.—Right to recover for damage sustained while using unlicensed motor vehicle, or vehicle driven by unlicensed operator.

I. Unlicensed motor vehicles:

a. General rule, 151.

b. Minority rule, 153.

c. Express statutory regulation, 156.

II. Unlicensed operator, 157.

This note does not cover cases of injury from defects in the highway.

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I. Unlicensed motor vehicles.

a. General rule.

The general rule that the fact that one when injured was violating a statute or ordinance does not preclude him from recovering for his injury, if such violation did not proximately contribute to it, is, by the great weight of authority, applicable where one was injured while riding in an unlicensed motor vehicle, or damage was negligently done thereto by another machine, it being held that a recovery under such circumstances is not barred by reason of the failure to comply with statutes providing in substance that motor vehicles shall be registered, and that such vehicles shall not be operated on the highway unless they are licensed.

ALABAMA.—*Birmingham R. Light & P. Co. v. Ætna Acci. & Liability Co.* (1913) 184 Ala. 601, 64 So. 44; *Stovall v. Corey Highlands Land Co.* (1914) 189 Ala. 576, 66 So. 577.

CALIFORNIA.—*Shimoda v. Bundy* (1914) 24 Cal. App. 675, 142 Pac. 109.

FLORIDA.—*Atlantic Coast Line R. Co. v. Weir* (1912) 63 Fla. 69, 41 L.R.A.(N.S.) 307, 58 So. 641, Ann. Cas. 1914A, 126; *Porter v. Jacksonville Electric Co.* (1912) 64 Fla. 409, 60 So. 188.

GEORGIA.—*Central of Georgia Ry. Co. v. Moore* (1919) 143 Ga. 581, 101 S. E. 668, answers to certified questions conformed to (1920) 24 Ga. App. 716, 102 S. E. 168; *Hines v. Wilson* (1920) — Ga. App. —, 102 S. E. 646.

INDIANA.—*Central Indiana R. Co. v. Wishard* (1914) — Ind. App. —, 104 N. E. 593.

IOWA.—*Lockridge v. Minneapolis & St. L. R. Co.* (1913) 161 Iowa, 74, 140 N. W. 834, Ann. Cas. 1916A, 158; *Phipps v. Perry* (1916) 178 Iowa, 173, 159 N. W. 653.

KENTUCKY.—*Moore v. Hart* (1916) 171 Ky. 725, 188 S. W. 861.

MAINE.—*Cobb v. Cumberland County Power & Light Co.* (1918) 117 Me. 455, 104 Atl. 894.

MINNESOTA.—*Armstead v. Lounsberry* (1915) 129 Minn. 34, L.R.A.1915D, 628, 151 N. W. 542, 9 N. C. C. A. 828.

MISSOURI.—*Dixon v. Boering* (1919) — Mo. App. —, 208 S. W. 279.

NEW JERSEY.—*Shaw v. Thielbahr* (1911) 82 N. J. L. 23, 81 Atl. 497.

RHODE ISLAND.—*Marquis v. Messier* (1917) 39 R. I. 563, 99 Atl. 527.

TEXAS.—*American Auto Ins. Co. v. Struwe* (1920) — Tex. Civ. App. —, 218 S. W. 534.

VERMONT.—*Gilman v. Central Vermont R. Co.* (1919) 93 Vt 340, 16 A.L.R. 1102, 107 Atl. 122.

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VIRGINIA.—*Southern R. Co. v. Vaughan* (1916) 118 Va. 692, L.R.A.1916E, 1222, 88 S. E. 305, Ann. Cas. 1918D, 242.

WASHINGTON.—*Switzer v. Sherwood* (1914) 80 Wash. 19, 141 Pac. 181, Ann. Cas. 1917A, 216.

CANADA.—*Halpin v. Grant Smith & Co.* (1920) — Alberta, —, 53 D. L. R. 381; *GODFREY v. COOPER* (reported herewith) *ante*, 134; *Martin v. Ralph* (1921) 54 N. S. 277.

The court in *Armstead v. Lounsberry*, *supra*, said: "Defendant contends plaintiff is barred of recovery in this action because his automobile was not registered as provided by law. Chapter 259, § 8, p. 307, Laws 1909, provided: 'No person shall operate or drive a motor vehicle on the public highways of this state. . . . unless such vehicle shall have been registered . . . and shall have the tag of registration assigned to it by the secretary of state conspicuously displayed on the rear of such vehicle. . . .'

"Plaintiff had not complied with this law. Defendant contends that he was therefore a trespasser upon the street, and that the only duty the traveling public owed to him was a duty not to wilfully or wantonly injure him. We do not concur in this contention. The fact that a person who sustains injury at the hands of another is at the time engaged in violation of some law may have an important bearing upon his right to recover. His violation of the law may be evidence against him, and in some cases may wholly defeat recovery. . . . But it is not every violation of the law that is even material evidence against him. The right of a person to maintain an action for a wrong committed upon him is not taken away because he was at the time of the injury disobeying a statute law which in no way contributed to his injury. He is not placed outside all protection of the law, nor does he forfeit all his civil rights, merely because he is committing a statutory misdemeanor. The wrong on the part of plaintiff which will preclude a recovery for an injury sustained by him must be some act or conduct having the relation to that injury of a cause to the effect produced by it. . . . Plaintiff's violation of the law, in order to affect his case, must, like any other act, 'be a proximate cause in the same sense in which the defendant's negligence must have been a proximate cause in order to give any right of action.' 1 Shear. & Redf. Neg. § 94. A collateral unlawful act not contributing to the injury will not bar a recovery. *Hughes v. Atlanta Steel Co.* (1911) 136 Ga. 511, 36 L.R.A.(N.S.) 547, 71 S. E. 728, Ann. Cas. 1912C, 394, 1 N. C. C. A. 429.

"Plaintiff's violation of law in this case is of this collateral character. There was no relation of cause and effect between the unlawful act and the collision. The registration of plaintiff's auto-

mobile was of no consequence to defendant. The law providing for such registration was not for the prevention of collisions, and had no tendency to prevent collisions. There is no pretense that the registration of plaintiff's automobile would have had any tendency to prevent this collision. Plaintiff's failure to obey the law in no way contributed to his injury, and could not bar his right of recovery. This rule is sustained by the great weight of authority."

And in *Derr v. Chicago, M. & St. P. R. Co.* (1916) 163 Wis. 234, 157 N. W. 753, it was held that the fact that the plaintiff was driving his automobile under the previous year's license, and had not procured a license for the current year, did not bar a recovery by him for damage resulting from a collision with a train, although the statute provided that no automobile should be operated on the highway unless it was registered.

And in *Halpin v. Grant Smith & Co.* (1920) — Alberta, —, 53 D. L. R. 381, it was held by a majority of the court that one who had recently purchased an automobile, and was operating it in violation of a section of the Motor Vehicle Act providing a penalty for the use of number plates by any person other than the owner to whom they had been issued, was not a trespasser on the highway, and was not, by reason of the violation of such act, precluded from recovering for damage resulting from the negligence of one constructing an irrigation ditch across the highway. Ives, J., however, dissented, taking the view that no recovery could be had under the circumstances in the absence of wilful misconduct on the part of the defendant.

The burden of showing that an automobile in which a person was riding when injured was not registered as required by statute has been held to be upon the one seeking to avoid liability for the injury on the ground that the machine was unregistered. *Lyons v. Jordon* (1918) 117 Me. 117, 102 Atl. 976; *Conroy v. Mather* (1914) 217 Mass. 91, 52 L.R.A.(N.S.) 801, 104 N. E. 487.

b. Minority rule.

A rule in conflict with that above stated to be supported by the weight of authority originated in Massachusetts, where a statute, providing for the registration of automobiles, and that "except as otherwise provided . . . no automobile or motorcycle shall . . . be operated upon any public highway, unless registered as above provided," has been construed to outlaw unregistered automobiles, and to give to their occupants no other right than that of being exempt from reckless, wanton, or wilful injury. *Dudley v. Northampton Street R. Co.* (1909) 202 Mass. 443, 23 L.R.A.(N.S.) 561, 89 N. E. 25; *Chase v. New York C. & H. R. R. Co.* 10 B. R. C.

(1911) 208 Mass. 137, 94 N. E. 377; *Love v. Worcester Consol. Street R. Co.* (1912) 213 Mass. 137, 99 N. E. 960; *Crompton v. Williams* (1913) 216 Mass. 184, 103 N. E. 298; *Dean v. Boston Elev. R. Co.* (1914) 217 Mass. 495, 105 N. E. 616; *Conroy v. Mather* (1914) 217 Mass. 91, 52 L.R.A.(N.S.) 801, 104 N. E. 487; *Wentzell v. Boston Elev. R. Co.* (1918) 230 Mass. 275, 119 N. E. 652.

The court in *Dudley v. Northampton Street R. Co.* *supra*, referring to the statute, said: "This provision, in addition to the penalties fixed for any operation of unregistered machines, forbids their being operated upon the highway at all. We cannot avoid the conclusion that it was intended to safeguard persons who were lawfully using the highways, from the serious risks of injury by machines of this character which were operated in defiance of the law, and the owners of which furnished no means by which they could be identified, and compelled to make proper compensation for the injuries which, by their violation of law or by their mere negligence, they might cause to other travelers. The legislature, in the opinion of a majority of the court, intended to outlaw unregistered machines, and to give them, as to persons lawfully using the highways, no other right than that of being exempt from reckless, wanton, or wilful injury. They were to be no more travelers than is a runaway horse. . . . The plaintiff as a mere trespasser upon the highway was there not only against the right of the owner of the soil, and so liable to an action by him, but also against the rights of all other persons who were lawfully using the highway. He was violating a law made for their protection against him; accordingly, he was a trespasser as to them. It follows that the defendant, which was lawfully using the highway with its cars, owed to the plaintiff no other or further duty than that which it would owe to any trespasser upon its property; that is, not the duty of ordinary care, as those words are commonly used, but merely the duty to abstain from injuring him by wantonness or recklessness."

And in *Chase v. New York C. & H. R. R. Co.* (1911) 208 Mass. 137, 94 N. E. 377, in denying one riding in an unregistered automobile a right to recover for an injury sustained in a collision with a locomotive engine, and holding that he could not invoke the benefit of a statute requiring a bell to be rung or whistle blown at crossings, the court said: "Under the decisions, the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. Everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law. In going along the way and entering upon the crossings the machine is an outlaw. The operator, in running it there and thus bringing it into collision with the locomotive engine, is guilty
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of conduct which is permeated in every part by his disobedience of the law, and which directly contributes to the injury by bringing the machine into collision with the engine. He is within the words of the statute. He is in no better condition to recover than a person would be who was violating the law by walking on the track of a railroad, and was struck by an engine when he had reached the crossing of a highway. Every minute of the time, and in every part of his movement, while walking upon the track in his approach to the crossing, he would be a violator of law and a trespasser. His unlawful act in walking to that point and thus coming into collision with the engine would directly contribute to his injury, and would preclude him from recovery."

And in *Holden v. McGillicuddy* (1913) 215 Mass. 563, 102 N. E. 923, where recovery was sought for damage to the plaintiff's unregistered automobile in a collision which occurred in Vermont, and the only provision of the Vermont statute which appeared was that "no automobile or motor vehicle shall be operated upon a public highway unless so registered," the court stated that the statute lacked some of the language employed in the Massachusetts act, but held, applying the general rules of the common law, that the Vermont act, like the Massachusetts, was not only enacted as a police regulation, but also for the protection of travelers on the highway, and that no recovery for damage resulting from the collision could be had in the absence of evidence that the defendant acted recklessly or wantonly.

And in *United Transp. Co. v. Hass* (1915) 91 Misc. 311, 155 N. Y. Supp. 110, affirmed in (1915) 171 App. Div. 971, 155 N. Y. Supp. 1145, which was affirmed without opinion in (1918) 222 N. Y. 623, 118 N. E. 1080, where the plaintiff's unregistered automobile was damaged while in Massachusetts, so that the law of that state governed, it was held that, under that law, an unregistered automobile had no right against other travelers, except to be protected from reckless or wanton injury.

And the Massachusetts doctrine was adopted in *Bortner v. York R. Co.* (1913) 22 Pa. Dist. R. 84, where it was held, under a statute similar to that in Massachusetts, that no recovery could be had for damage done to the plaintiff's automobile when it collided with a street car, it appearing that the automobile was unregistered, and that the operator had no license to operate it, and that there was no wanton misconduct on the defendant's part.

And in *Knight v. Savannah Electric Co.* (1917) 20 Ga. App. 314, 93 S. E. 17, where a statute provided that it shall be "unlawful for any person to run, drive, or operate any automobile . . . propelled by steam, gas, gasoline, electricity, or any power other than muscular power . . . upon or along any public road, 10 B. R. C.

. . . except and until such person shall comply with the provisions of this act," and one of the provisions required every person owning an automobile to register it and pay a registration fee, it was held that the intent of the statute was to outlaw unlicensed machines and to give them, as to persons lawfully using the highways, no other right than that of exemption from reckless, wanton, or wilful injury; and accordingly that one who was driving an unlicensed motorcycle could not recover against a railway for an injury sustained, although the collision between the motorcycle and car was due to the defendant's negligence, there being no evidence of wilfulness or wantonness.

And in *Contant v. Pigott* (1913) — Manitoba, —, 24 West. Week. Rep. 946, 15 D. L. R. 358, it was decided that one who had sustained an injury while driving an automobile not licensed as required by the Manitoba statute, the provisions of which are not stated, could not recover where it was not shown that the injury was wilful or malicious.

c. Express statutory regulation.

The Connecticut statute expressly denies the right to recover for personal injuries sustained while riding in an unregistered motor vehicle.

Thus, in *Stroud v. Water Comrs.* (1916) 90 Conn. 412, 97 Atl. 336, one who had falsely registered his car in a wrong name was denied a right to recover for an injury to the machine which was negligently run into while standing in front of a hotel, the decision being under the Connecticut statute providing that no recovery should be had in the courts "by the owner or operator or any passenger of a motor vehicle which had not been legally registered" in accordance with the statute, "for any injury to person or property received by reason of the operation" of the car in or upon the highways. It was argued in this case that the registration provisions were primarily for revenue, and that the false statements were immaterial, but the court took the view that such statements were material, since one important object of registration was identification.

In *Brown v. New Haven Taxicab Co.* (1917) 92 Conn. 252, 102 Atl. 573, it was held that the word "owner" as used in the Connecticut statute set out in the preceding case included one having an interest in property under a special title, and there being evidence that the legal title to the car driven by the plaintiff was in an automobile company which had given a conditional bill of sale to the person who loaned plaintiff money to pay for the car, it was held that the evidence of ownership by the plaintiff, in whose name

the car was registered, was sufficient to entitle him to go to the jury in an action to recover for damage to the car and personal injuries.

The harshness resulting from the strained construction adopted by the Massachusetts court has been remedied by statute as to persons, other than the owner of the unregistered machine, who did not know, or have reasonable cause to know, that the statute was being violated.

Thus it appears in *Wentzell v. Boston Elev. R. Co.* (1918) 230 Mass. 275, 119 N. E. 652, that the Massachusetts statute was changed by Stat. 1915, chap. 87, which provided that a violation of the statute for the registration of automobiles "shall not constitute a defense to actions of tort for injuries suffered by a person, or for the death of a person, or for injury to property, unless it is shown that the person injured in his person or property or killed was the owner or operator of the motor vehicle the operation of which was in violation of said provisions, or unless it is shown that the person so injured or killed, or the owner of the property so injured, knew or had reasonable cause to know that said provisions were being violated." This statute was held not operative in that case, however, since the injuries were sustained before its passage, and the Massachusetts rule was applied, holding the occupant of an unregistered automobile a trespasser on the highway, and not entitled to recover for an injury, in the absence of wanton and wilful misconduct on the defendant's part.

The amended statute just referred to was applied, however, in *Rolli v. Converse* (1917) 227 Mass. 162, 116 N. E. 507, where it was held that one who was injured while riding in an unlicensed motor truck was not thereby precluded from recovery for his injury, where it appeared that he was an employee of the owner, and there was no evidence that he knew or had reasonable cause to know that the truck was not legally registered. But it was held that there could be no recovery for damage to the truck, or for an injury to a member of the partnership owning it, where such member and the other partners knew that the truck was not properly registered.

II. Unlicensed operator.

Attention is called to the fact that only in case of the nonregistration of motor vehicles has the Massachusetts court construed the statute broadly enough to exclude a right of recovery because of a failure to comply with the statute regulating registration; and it is held, even in that state, that the fact that one injured while in an automobile on a highway had employed an unlicensed person to operate it, contrary to the provisions of the statute, will not of itself

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prevent holding the one responsible for the accident liable, although it is evidence of negligence on the part of the plaintiff. *Conroy v. Mather* (1914) 217 Mass. 91, 52 L.R.A.(N.S.) 801, 104 N. E. 487.

And in the following cases it was held that the fact that the operator of the plaintiff's automobile had no license would not bar a recovery for an injury, where this fact had no causal connection with the injury: *Porter v. Jacksonville Electric Co.* (1912) 64 Fla. 409, 60 So. 188; *Crossen v. Chicago & J. Electric R. Co.* (1910) 158 Ill. App. 42; *Moyer v. Walden W. Shaw Livery Co.* (1917) 205 Ill. App. 273; *Moore v. Hart* (1916) 171 Ky. 725, 188 S. W. 861; *Dixon v. Boeving* (1919) — Mo. App. —, 208 S. W. 279; *Stack v. General Baking Co.* (1920) 283 Mo. 396, 223 S. W. 87; *Yeager v. Winton Motor Carriage Co.* (1913) 53 Pa. Super. Ct. 202; *Hadeed v. Neuweiler* (1915) 44 Pa. Co. Ct. R. 53; *McIlhenny v. Baker* (1916) 63 Pa. Super. Ct. 385; *GODFREY v. COOPER* (1919) (reported herewith) *ante*, 134.

And in *Zageir v. Southern Exp. Co.* (1916) 171 N. C. 692, 89 S. E. 43, it was held that the fact that the plaintiff was driving her automobile without having stood the examination or obtained the license prescribed by a city ordinance did not prevent a recovery for an injury sustained through the defendant's negligence, since to bar a recovery the failure to comply with these acts must have been a proximate cause of the injury, and not merely a collateral, unlawful act not contributing thereto.

And in the reported case (*GODFREY v. COOPER*, *ante*, 134) the fact that the driver of the motor vehicle in which the plaintiffs were passengers was operating the vehicle in violation of the Motor Vehicles Act, providing that "no person shall, for hire, pay or gain, drive a motor vehicle on a highway" unless licensed, was held by a majority of the court not to preclude a recovery for injuries caused by the defendant's negligence, the majority refusing to sanction the Massachusetts rule holding travelers in unlicensed automobiles to be trespassers on the highway, having no rights, except to be protected from wilful or wanton injury.

In *Kiely v. Ragali* (1919) 93 Conn. 454, 106 Atl. 502, it was held that one holding an operator's license did not become an unlicensed person by omitting to carry his operator's license, and that such omission would not preclude a recovery for damage sustained in a collision.

In *Shea v. Corbett* (1921) 97 Conn. 141, 115 Atl. 694, where one licensed under the laws of New York to operate an automobile, who had not operated a car in Connecticut for over thirty days, was injured in the latter state by a collision while driving the car of a friend, which was licensed in Connecticut, it was held that he was not precluded

from recovery for a personal injury, it appearing that one section of the Connecticut motor vehicle act provided that any nonresident over eighteen who had complied with the laws of the state within which he resided relating to motor vehicles and their operation might operate such motor vehicle upon the highways of the state for a period not exceeding thirty days in any year, without complying with the provisions of the act, requiring the registration of motor vehicles, and that a nonresident operating a motor vehicle for more than thirty days in violating of the section should be fined, and that another section of the act provided that no recovery should be had in the courts of the state by the owner of a motor vehicle which had not been legally registered in accordance with the act for injury to person or property received by reason of the operation of such motor vehicle upon any public highway unless it was the property of a nonresident, and within the section above set out, and that no recovery should be had if such motor vehicle was legally registered but was being operated by an unlicensed person in violation of the act. The court here refused to adopt the defendant's contention that as the operator was driving a car with a Connecticut registration the statute denied him the protection of his New York license certificate; that the nonresident provision must, both as to license and car registration, be coincident and correlated in their effect, and that, assuming the thirty-day limitation not to have been exceeded in either case a New York car could not have been operated by a Connecticut licensee nor a Connecticut car by a New York licensee. The court said: "We think this narrow construction is not warranted by the language or the manifest purpose of the act, and that such construction materially limits the comity character of the statute. There is no connection between the license to operate and the registration of the car. Probably in a great majority of cases the operator is not the owner of the car he is operating. An operator's license is purely a personal privilege, non-transferable and granted by the state on account of fitness. *Prince v. Case* (1834) 10 Conn. 375, 27 Am. Dec. 675; *Berry, Automobiles*, 3d ed. §§ 100 and 260. The registration certificate is for the purpose of identification and revenue. Operator and owner, while they may, of course, be the same person, are treated in the motor vehicle laws as entirely unrelated. The license is independent of ownership, and in no way counts on ownership, and registration by an owner is equally independent of the question of the license to operate, and contains no reference to operation, and our statute so considers and treats them. The only color for the contrary claim is that the statute (§ 21) refers both to license and registration. It is the case of a single condensed statute relating to two distinct subjects of regulation, entirely separate in their purpose, neither one in any sense dependent upon the other, and the provisions are quite disjunctive in their character, only

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brought together for brevity of treatment. The requirement is not a joint requirement of a combination of the two subjects which would manifestly, in most cases, be impracticable, but it is that, in the case of a nonresident operator, he shall have complied with the law of his state, and that, in the case of the car, the owner shall have complied with the law of registration in the state where the car is owned. We cannot see why, for instance, a properly licensed New York operator cannot, under our statute, operate a properly registered New Jersey car in Connecticut for the limited period allowed. The statute says that 'any nonresident over eighteen years of age, who has complied with the laws of the state within which he resides relating to motor vehicles and the operation thereof,' may operate in the state, etc. In order to accomplish its purpose to any beneficial extent, this language must be construed as meaning that any nonresident operator and any nonresident owner must have complied, as respects operation and ownership respectively, with the laws of the state where the operator or car may be located. In no other way can the purpose of the act to require that nonresident operators and cars owned by nonresidents must each possess the proper credentials from the state of residence be adequately secured. Slonski's possession of a New York operator's license would, under the statute, exempt him from taking out a license in the state of Connecticut for the thirty days named in this statute, quite irrespective of whether he owned a car or not, and so the owner's registration would likewise exempt him for the same period from taking out a Connecticut registration card, whether he were the operator or not. In effect Slonski was, at the time named, entitled to the rights and privileges of a Connecticut licensed operator, not in any way limited or conditioned upon the registration of the car which he might be driving."

But it was held in the above case that independently of whether the driver was to be considered as protected by his New York license or not he was not deprived of his right to recover for a negligent injury, the court stating that the statute merely provided for a penalty for a failure to take out a license and did not otherwise punish an operator, and pointed out that the original statute, which provided that no recovery should be had in the courts of the state by the owner or operator, or any passenger of a motor vehicle which had not been legally registered, had been amended by striking out the words "or operator or passenger."

And in the *Shea Case* it was held that although the driver of the car had not obtained a license under the Connecticut Act that the owner of the car was nevertheless entitled to recover for the damage to his car, since the provision as to nonresidents expressly excluded the driver from the operation of the general provision requiring operators to obtain licenses, and the car was therefore not being operated in violation of the motor vehicle law.

J. T. W.

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[HIGH COURT OF AUSTRALIA.]

McGUIRE (*Plaintiff*), Appellant,
and
THE UNION STEAMSHIP COMPANY OF NEW ZEALAND (*Defendant*), Respondent.

(27 C. L. R. (Austr.) 570.)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

Workmen's compensation — Accident — Chill contracted while working in exposed place — Resulting illness.

Injury sustained by a winchman in consequence of a chill contracted while operating an electric winch on a ship's deck, in the open, on an ordinary winter's night, while working a twenty-four hour shift, as a result of which he developed pneumonia, which, in consequence of an injury to his elbow about eighteen months before, so affected his arm as to incapacitate him from work,—is an injury by accident within the meaning of the Workmen's Compensation Act, the occurrence being unexpected.

Decision of the Supreme Court of New South Wales: *Maguire v Union Steamship Co. of New Zealand*, 19 N. S. W. St. Rep. 279, reversed.

(June 14, 1920.)

APPEAL from the Supreme Court of New South Wales.

A claim having been made by Alexander McGuire against the Union Steamship Company of New Zealand, Ltd., under the Workmen's Compensation Act 1916 (N.S.W.), for compensation for personal injury by accident arising out of and in the course of his employment by the company, and a question having arisen as to the liability of the company to pay compensation under the act in respect of the alleged injury, an arbitration took place before a district court judge for the settlement of the question. At the hearing it was admitted by the company that McGuire's wages were 3*l.* 15*s.* a week, and that he was then totally incapacitated. The district court judge, having heard evidence, made an award in favor of the company; and his findings of fact and the reasons for his award are set out in the judgment of Knox, C.J., hereunder. From the decision of the district court judge, McGuire appealed to the Supreme Court, and the full court by a majority

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(Sly and Owen, JJ., Ferguson, J., dissenting) dismissed the appeal. *Maguire v. Union Steamship Co. of New Zealand*, 19 N. S. W. St. Rep. 279.

From the decision of the full court McGuire now, by special leave, appealed to the High Court.

Monahan, for the appellant.

Broomfield, K.C., and Halse Rogers, for the respondent.

[During argument the following authorities were referred to: *Fenton v. J. Thorley & Co.* [1903] A.C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684; *Clover, Clayton & Co. v. [572] Hughes* [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885; *Glasgow Coal Co. v. Welsh* [1916] 2 A. C. 1, *post*, —, 85 L. J. P. C. N. S. 130, 114 L. T. N. S. 809, 32 Times L. R. 359, 60 Sol. Jo. 336, 9 B. W. C. C. 371, [1916] S. C. 141, 53 Scot. L. R. 311; *Warner v. Couchman* [1911] 1 K. B. 351, at p. 356, 80 L. J. K. B. N. S. 526, 103 L. T. N. S. 693, 27 Times L. R. 121, 55 Sol. Jo. 107, 4 B. W. C. C. 32, 1 N. C. C. A. 51; *Trim Joint District School Board of Management v. Kelly* [1914] A. C. 667, at p. 674, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 7 B. W. C. C. 274, 48 Ir. L. T. 141, Ann. Cas. 1915A, 104; *Brintons Ltd. v. Turvey* [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137; *Innes v. Kynoch* [1919] A. C. 765, 9 B. R. C. 478, 88 L. J. P. C. N. S. 85, 121 L. T. N. S. 39, 35 Times L. R. 392, 63 Sol. Jo. 444, 12 B. W. C. C. 78, 56 Scot. L. R. 345; *Ismay, Imrie & Co. v. Williamson* [1908] A. C. 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713; *Sheerin v. Clayton & Co.* [1910] 2 Ir. R. 105, 44 Ir. L. T. 23, 3 B. W. C. C. 583; *Maskery v. Lancashire Shipping Co.* (1914) 7 B. W. C. C. 428; *Morgan v. Owners of the Zenaida* (1909) 2 B. W. C. C. 19, 25 Times L. R. 446; *McMillan v. Singer Sewing Machine Co.* (1913) 6 B. W. C. C. 345, 50 Scot. L. R. 220; *Stuart v. Christchurch Tramway Board* 17 N. Z. Gaz. L. R. 391; *Pyper v. Manchester Liners Ltd.* [1916] 2 K. B. 691, 85 L. J. K. B. N. 10 B. R. C.

S. 1459, 115 L. T. N. S. 406, 32 Times L. R. 723, 60 Sol. Jo. 706, 9 B. W. C. C. 580; *Eke v. Hart-Dyke* [1910] 2 K. B. 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482, 3 N. C. C. A. 230; *Lyons v. Woodilee Coal and Coke Co.* [1917] W. N. 151, 86 L. J. K. B. N. S. 137, 117 L. T. N. S. 65, 10 B. W. C. C. 416, 61 Sol. Jo. 490; *Broderick v. London County Council* [1908] 2 K. B. 807, 77 L. J. K. B. N. S. 1127, 99 L. T. N. S. 569, 24 Times L. R. 822, 15 Ann. Cas. 885; *Martin v. Manchester Corporation* [1912] W. N. 105, 28 Times L. R. 344, 106 L. T. N. S. 741, 76 J. P. 251, 5 B. W. C. C. 259; *Dennis v. A. J. White & Co.* [1917] A. C. 479, at pp. 483, 492, 86 L. J. K. B. N. S. 1074, 116 L. T. N. S. 774, 33 Times L. R. 434, 61 Sol. Jo. 558, 10 B. W. C. C. 280, Ann. Cas. 1917E, 325, 15 N. C. C. A. 294; *Alloa Coal Co. v. Drylie* [1913] S. C. 549, 6 B. W. C. C. 398, 50 Scot. L. R. 350, 4 N. C. C. A. 899; *Coyle v. John Watson Ltd.* [1915] A. C. 1, [1914] W. N. 195, 83 L. J. P. C. N. S. 307, 111 L. T. N. S. 347, 30 Times L. R. 501, 58 Sol. Jo. 533, 7 B. W. C. C. 259, [1914] S. C. 44, 51 Scot. L. R. 492.]

Cur. adv. vult.

The following judgments were read:—

Knox, C.J.: The appellant claimed from the respondent compensation under § 5 (1) of the Workmen's Compensation Act 1916, which reproduces § 1 (1) of the Imperial Act, 6 Edw. VII. chap. 58. The claim, being disputed, came before Scholes, D.C.J., whose findings, so far as they are material to the question raised by this appeal, are as follows:—“(a) The workman, who was in his usual good health and who was a winchman, commenced a twenty-four hours' shift at an electric winch at 8 A. M. on the morning of 17th July last, and worked with the usual breaks till 6.30 A. M. on 18th July. (b) The night of the 17th-18th was cold with a very light breeze, almost still. (c) The deck and the winch at which the workman worked were uncovered. (d) The long shift was not an unusual task for a man in that employment. (e) At 6.30 A. M. on the 18th the workman had an attack of 'cold shiv-
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ers,' and he went home and to bed. (f) On the 19th his medical adviser sent him to the [573] hospital, and diagnosed definite pneumonia. (g) The workman had, some eighteen months previously, suffered an injury to his elbow; the pneumonic organism attacked that injured spot, an operation upon the elbow was performed, and his arm is now so useless as to render the workman for the present totally incapacitated from work." The learned district court judge, having stated his findings, then said: "The question is whether or not on these facts 'personal injury by accident arising out of and in the course of the employment' was caused to this workman. I imagine that it will be conceded that personal injury arising out of and in the course of the employment was caused to the workman. The personal injury must by virtue of the statute be 'by accident.' This workman, working a long shift through the night in an exposed place, contracted a chill which developed into pneumonia, and he is incapacitated. Is this 'injury by accident?' In 1905, in *Brintons Ltd. v. Turrey* [1905] A.C., at p. 236, 2 Ann. Cas. 137, Lord Robertson said: 'Colloquially, and accurately, we say that So-and-So accidentally caught cold or any other disease, and yet no one would think of saying that he had met with an accident.' In *Eke v. Hart-Dyke* [1910] 2 K.B. 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482, 3 N. C. C. A. 230, Lord Justice Kennedy rejects the suggestion that a man catching cold had met with an accident. In 1912, in the case of *McMillan v. Singer Sewing Co.* (1913) 6 B. W. C. C. 345, 50 Scot. L. R. 220, [1913] S. C. 575, it was held not to be 'personal injury by accident' when a canvasser, hurrying to get his work done in time, contracted a chill which developed into pleurisy. I think this case is distinguishable from the case of *Alloa Coal Co. v. Drylie* [1913] S. C. 549, 6 B. W. C. C. 398, 50 Scot. L. R. 350, 4 N. C. C. A. 899, in that there the 'personal injury' was directly traceable to the 'accident' of the pump being defective causing an overflow of cold water. In my opinion the personal injury claimed for in this arbitration is not 'by accident,' and, therefore, I make an award in favor of the respondent."

The only question raised by this appeal is whether the appellant suffered "injury by accident" within the meaning of the 10 B. R. C.

section above referred to. An examination of the authorities cited in the course of the argument leads me to the conclusion that it must now be taken as settled by a long series of decisions that "injury by [574] accident" means "accidental injury," and that an injury may be said to be accidental whenever it is the result of an unexpected occurrence or of the unexpected nature of the operation of an occurrence in producing the injury. Apart from the decision of the House of Lords in *Lyons v. Woodilee Coal and Coke Co.* (1917) 10 B. W. C. C. 416, 117 L. T. N. S. 65, which was pressed on us by counsel for the respondent, I should feel no difficulty in coming to the conclusion that the learned district court judge was in error in holding, as it appears to me he did hold, that he was precluded in law from deciding that the injury sustained by the appellant was an "injury by accident." The facts of that case are thus stated in the headnote to the report in *Butterworth's Workmen's Compensation Cases*, 10 B. W. C. C. 416: "A brusher, having finished his night's work, went to the pit shaft to be taken to the surface, just at the time when the daily statutory inspection of the shaft was beginning. Usually the inspection took about half an hour, but that morning, owing to a break-down of the bell wire, it took over an hour. During all that time the workman was standing about and caught a chill which developed into pneumonia, from which he died. There was no stated time for brushers on the night shift to leave off work, and, except during the inspection of the shaft, they were at once sent to the surface. The arbitrator found that, although the cause of the man's death arose out of and in the course of his employment, nevertheless it was not due to an 'accident.' The time when the daily inspection of the shaft took place was known to the workman, and he had chosen to break off work just at the time when the inspection was taking place, and the unusual delay caused by the breaking of the bell wire was too remote a cause for the delay to complete the chain of causation. He, therefore, made his award in favor of the respondents." On these facts the arbitrator found that the death of the claimant was not due to an accident arising out of and in the course of his employment. It appears from the report in the *Law Times*, 117 L. T. N. S. at p. 66, that counsel for the claimant put his case thus: "The break-down of the bell wire, 10 B. R. C.

the consequent unusual delay, and the resultant prolonged exposure causing chill, upon which pneumonia and death supervened, caused an [575] unbroken chain of causation. But, assuming that the break-down was not in the sense of the act the accident which caused the injury, at any rate the unusual delay must be regarded as the accident. Alternatively, the accident was the miscalculated effect of the prolonged exposure to the draught. Avowedly the arbitrator placed this case in the category of which *McLuckie v. John Watson Ltd.* [1913] S. C. 975, 6 B. W. C. C. 850, 50 Scot. L. R. 770, is an example. But it is distinguishable from that case on every material particular." In delivering judgment Lord Loreburn, L.C., said that he could not say that there was no evidence which would reasonably warrant the conclusion at which the arbitrator had arrived, and Lord Shaw added that, looking on the case in its entirety, he saw no reason to suggest to his mind that the learned sheriff did not come to a correct finding.

I cannot find any substantial distinction between the facts of that case and the facts of the case now under consideration. In each case the workman caught a chill which developed into pneumonia, in each case the chill was caused by prolonged exposure during the employment of the workman, and in each case the arbitrator found that the injury arose out of and in the course of the employment. It appears to me that, if this appeal had come before the same tribunal which decided that case, the decision would have been the same, *viz.*, that the arbitrator having found that the injury was not an "injury by accident" his decision must stand. It is true that in the present case the learned district court judge apparently thought that he was precluded by decisions binding on him from holding that the injury was an injury by accident, and that in *Lyons's Case, supra*, the arbitrator appears to have found as a fact that the injury was not caused by accident, but it seems to me to follow from the decision in that case that in the present case it was open to the learned district court judge to find as a fact that the injury was not caused by accident.

I find myself unable to reconcile the decision in *Lyons's Case* with what I regard as the settled rule, that injury by accident means neither more nor less than accidental injury as defined above. Under these circumstances I think I am bound to be
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guided by what I believe to be the settled rule to be deduced from a long series of [576] decisions, rather than to treat the decision in *Lyons's Case* as governing this case. I am therefore of opinion that the learned district court judge was in error in deciding that it was not open to him to hold on the facts of this case that the injury sustained was injury by accident within the meaning of the act. As I read the decision of the learned district court judge it appears to me that he did not apply his mind to the determination of the question whether the injury was in fact accidental within the meaning attributed to that word by the House of Lords in *Fenton v. J. Thorley & Co.* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, as explained by Lord Macnaghten in *Clover, Clayton & Co. v. Hughes* [1910] A. C. at pp. 247, 248, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885.

The question whether the injury sustained was accidental is a question of fact, and in the view I take it was the duty of the learned district court judge to decide this question, and he has not done so. I cannot satisfy myself from the findings of the learned district court judge that he would certainly have decided as a fact that the injury was accidental, if he had felt that he was at liberty to do so, nor do I think that upon the facts found by him it would not be open to him to find as a fact that the injury was not accidental.

Under these circumstances I think the proper course for this court to adopt is to remit the matter to the district court judge in order that he may decide as a fact whether the injury was or was not accidental.

Isaacs and Rich, JJ. (read by Isaacs, J.). The question we have to determine is whether, on the facts found by the district court judge, the personal injury sustained by the appellant was an "injury by accident" within the meaning of the Workmen's Compensation Act 1916 of New South Wales.

That act is, for present purposes, identical with the English Act of 1906. Local adaptations leave unaffected the particular provisions we have to construe and apply. Its genesis is practically
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identical. English decisions are, therefore, in point. Many of them are discordant, and some are irreconcilable even where not expressly overruled. It cannot be said that the enactment is unambiguous; the prolonged and strenuous argument we have had, [577] notwithstanding the House of Lords' cases, is convincing proof of that. The argument covered a wide field. It investigated the inherent meaning of the word "accident," its meaning in its setting in this act, apart from the decisions; it questioned the real meaning of the House of Lords' decisions, with special reference to Lord Macnaghten's classical exposition in *Fenton v. J. Thorley & Co.* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684; it gave special prominence to the case of *Lyons v. Woodilee & Co.*, particularly as reported in the Law Times (1917) 117 L. T. N. S. 65, as indicating a limit to the generality of Lord Macnaghten's expressions in *Fenton's Case*, even if his words were otherwise to be read as broadly as they primarily suggest. It is therefore clear that the case is a very important one, and will guide future decisions in Australia.

The learned district court judge (Judge Scholes) found the facts very fully and distinctly, but held—apparently on his reading of three decisions quoted by him—that the facts so found did not in law amount to "injury by accident" within the meaning of the act. In other words, he arrived at his final conclusion upon his construction of the act. On appeal the Supreme Court of New South Wales, by a majority, upheld that construction—Ferguson, J., dissenting. Sly, J., was of opinion that as there was nothing abnormal in the employment or the event causing the chill, the injury was not "by accident." Owen, J., seems to have rested his decision on the same ground, holding that as a matter of law, where a workman of normal health was working in an exposed position and running the risk of catching a chill, it could not be said in case he did catch a chill that there was any untoward event which resulted in the injury. Ferguson, J., held that abnormality of conditions is immaterial on the question of "accident," and that the real question was whether the mishap of contracting the chill was unexpected and, perhaps, sudden,—provided, of course, that it arose out of and in the course of the employment. The author-

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ities were fully cited, and it is our duty to consider which construction is correct.

We think it is correct to say that the present case carries not the interpretation, but the application, of the law further than any of the reported decisions, unless we except *Sheerin v. Clayton & Co.* [1910] 2 Ir. R. 105, 44 Ir. L. T. 23, 3 B. W. C. C. 383, [578] and consequently we think it all the more desirable that our reasons for the conclusion at which we arrive should be explicitly stated. It seems to us that in the circumstances it will be more satisfactory if, in determining the construction of the act, regard is had to three great factors which are always legitimate considerations where there is an admitted or alleged ambiguity in an enactment. One is the fabric of the law—common law and statute law—that lies behind it, and which it was intended to modify or supplant; the next is its history; and the third is the broad character of the enactment itself, read and considered as a whole. The first factor points to the evils intended to be met; the second is a guide to the interpretation of the terms adopted by the Legislature, and the third materially aids by the context in the construction of any particular part.

First, with regard to the law. Until 1837 the obligation of an employer in respect of the safety of his employees had not received any judicial standard. In that year *Priestley v. Fowler*, 3 Mees. & W. 1, 150 Eng. Reprint, 1030, Murph. & H. 305, 7 L. J. Exch. N. S. 42, 1 Jur. 987, 19 Eng. Rul. Cas. 102, laid down, or has been supposed to lay down, the principle that apart from special contract or negligence of the employer himself, personal or imputable, an employee (unlike a stranger) had no claim upon him for injuries sustained in his service, even though they arose through the negligence of another employee selected by the employer if he was engaged in the same common service. This was followed in several cases, including the *Bartonshill Coal Co. Cases* in the House of Lords, 3 Macq. H. L. Cas. 266-315, 4 Jur. N. S. 767, 6 Week. Rep. 664, 19 Eng. Rul. Cas. 107, in 1858. There reference was made by Lord Cranworth, 3 Macq. H. L. Cas. at p. 297, to the celebrated judgment of Shaw, C.J., in *Farwell v. Boston and Worcester Railroad Corporation*, 4 Met. 49, 38 Am. Dec. 339, 5 Am. Neg. Cas. 407, in 1842. Lord Cranworth recognized 10 B. R. C.

that judgment as expressing the English common law. See also Palles, C.B., in *Waldron v. Junior Army and Navy Stores* (1910) 2 Ir. R. 381, at p. 384. In *Farwell's Case* there is a passage which contains the initial doctrine of the law we are considering. Shaw, C.J., speaking of the employee's contract of service, said, 3 Macq. H. L. Cas. at p. 319; "It was a voluntary undertaking on his part, with a full knowledge of *the risks incident to the employment*; and the loss was sustained by means of an *ordinary casualty*, caused [579] by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a *pure accident*, like those to which all men, in all employments and at all times, are more or less exposed; and like *similar losses from accidental causes*, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default, of which we give no opinion." *Coldrick v. Partridge, Jones & Co.* [1910] A.C. 77, 79 L. J. K. B. N. S. 173, 101 L. T. N. S. 835, 26 Times L. R. 164, 54 Sol. Jo. 132, 47 Scot. L. R. 610, is a very modern illustration. It is, we think, of the first importance, in relation to the matter in hand, to observe that the word "accident" in the passage quoted from *Farwell's Case*, *supra*, does not refer to what may be called the concrete occurrence itself, which was the cause of the injury, but refers, so to speak, to the abstract quality of that occurrence. The occurrence itself was treated as the cause of the injury, but "accident" and "accidental" are used as attributives of the occurrence. The same occurrence, if imputable to the employer himself, would have made him responsible, but its accidental nature, its quality of "pure accident" as contradistinguished from the employer's negligence, made it "a risk incident to the employment," and this the employee was bound to bear *entirely*. We emphasize the word "entirely." The passage quoted, which, when later English decisions are examined, is, through the repetition of the words by Lord Cranworth, the source of at least one expression that has gained currency in our law, was avowedly based, as was the former decision of *Priestley v. Fowler*, *supra*, on what judges considered reasons of public policy. It was for reasons of policy and expediency as they commended themselves to the judicial mind in 1837 and 1842 and 1858, that the implication of contractual obligation

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between employer and employee did not extend to include the ordinary maxim *Qui facit per alium facit per se*.

An injury occurring through the negligence of a fellow servant was therefore treated, as regarded an injured employee, as a "pure accident," simply because it was deemed to arise from one of the incidental risks of the employment, and not from the master's negligence. In 1880 this was altered by the Employer's Liability Act, of which it is sufficient here to say that its main effect was in [580] certain stated circumstances to place the injured employee in the position of a stranger and to exclude the defense of common employment (*Thomas v. Quartermaine* L. R. (1887) 18 Q. B. Div. 685, at p. 700, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. It also to some extent operated in favor of the employer, but that is not so important here, though it is not improbable the idea was carried into the later act. But even the amelioration of the workman's position created by the Employer's Liability Act left him under serious practical disabilities. In 1889 an instance is recorded. In *Harris v. Tinn* (1889) 5 Times L. R. 221, a workman was seriously injured in an iron rolling mill. He sued under the act, and obtained a verdict and judgment. On appeal, however, the judgment was set aside, as the foreman, whose act had caused the injury, was not negligent. There Lord Coleridge, C.J., who apparently thought the case a very hard one, used the word "accident" in two senses; first as the concrete occurrence, and next in the phrase "*a pure accident*," the latter being identical with that of Shaw, C.J. Lindley, L.J., in the Court of Appeal, in *Smith v. Baker & Sons* [1891] A.C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660, expressed himself in the latter sense ("*pure accident* without any element of negligence"). See Lord Watson's judgment in that case [1891] A. C. at p. 349. Another formidable disability manifested itself about the same time, practically started by the judgment of Bowen, L.J., in *Thomas v. Quartermaine*, the doctrine of *Volenti non fit injuria*. No doubt the House of Lords in *Smith v. Baker & Sons* restricted the application of that doctrine, but they affirmed its existence, and reaffirmed [1891] A. C. at p. 356, the principle that the bur-

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den of risking incidental dangers of the employment rested on the workman, and not on the employer.

Next, as to the history of the measure. The pressure of the disabilities of workmen was constantly increasing. The advancing complication of industry in many occupations vitally altered in practice the relative positions of employer and workman. In connection with another but cognate branch of the law, we have recently made reference to this change. See *Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation* (1919) 26 C. L. R. (Austr.) 508, at pp. 555, 556. We also there referred to the final report of the Royal Commission [581] to be found in the House of Commons Papers for 1894, vol. xxxv., pp. 9 *et seq.* That Commission took evidence, not merely as to causes of trade disputes, but also as to the dissatisfaction among workmen with relation to the obligations of their employers for their safety and in case of injury. Some of the evidence went to show that workmen's organizations existed for insuring the members against risks of their employment, and that in some cases employers contributed to the accident funds. Appendix V. of the Report (pp. 556, 557) is headed "Memorandum on the Evidence Relating to Employers' Liability." Part I. of the Appendix is, "What the law is;" and Part II., "How the law works." The statement of existing law is valuable as evidencing the popular meaning of the word "accident" in connection with the subject-matter, because, although the Commission (the representative character of which can, to some extent, be seen at p. 559 of 26 C. L. R.) expressed no opinion on the general policy, they united in adopting the Appendix. The Imperial Parliament had that statement before it when shortly afterwards it legislated on the subject. After stating in various paragraphs the general law as to actions for negligence, the Appendix proceeds, in par. 809, to refer to the absence of the employer's responsibility at common law for his workman's negligence where the plaintiff is also a workman in the same employment as the negligent workman. In par. 810 it is pointed out that the doctrine of common employment is of quite recent origin. Then, in par. 811, this is stated: "In an action for negligence, brought by a workman against his employer, the defenses, therefore, are—

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(a) no negligence, but *accident*; (b) acquiescence; (c) contributory negligence; (d) common employment." Par. 817 indicates the hardships on workmen notwithstanding the Employer's Liability Act. In 1896 a Trade Disputes Act (Conciliation Act 1896) was passed, and in 1897 the first English Workmen's Compensation Act was enacted. The act was limited to certain employments, extended in 1900 to agriculture, and finally in 1906 (after *Fenton v. J. Thorley & Co.* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 864, in 1903, and *Brintons Ltd. v. Turvey* [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137, in 1905, be it observed) the enactment was extended, generally speaking, to all employments. The act, as originally intituled, referred to "Compensation to workmen for [582] accidental injuries suffered in the course of their employment." In the 1906 Act the word "accidental" is omitted, and the New South Wales Act follows in this respect the Act of 1906. That represents the relevant history of the English legislation, and in Australia the material elements of that history are identical.

The third factor to which we have alluded is the broad character of the enactment. Lord Macnaghten said of it, in *Fenton's Case* [1903] A. C. at p. 447: "Parliament is making a new departure in the interest of labor." Of the character of that departure there can be no question. It revolutionized the relation of the employer and workman in the industries to which it applied. It reversed, *pro tanto*, the purely arbitrary notion of public policy that judges had formulated and acted upon, a notion which Neville, J., has severely criticized in *Hayward v. Drury Lane Theatre and Moss' Empires* [1917] 2 K. B. 899, at p. 915, 117 L. T. N. S. 523, 33 Times L. R. 557, 61 Sol. Jo. 665, 143 L. T. Jo. 235. It was a distinct step in that process of change in the position of industrialists which we described in the *Municipal Employees' Case* (1919) 26 C. L. R. (Austr.) at p. 555, as from "one of pure contract to one of status." It eliminated fault or contract as the basis of responsibility. It did not give "damages," but a limited "compensation" (*Victor Mills Ltd. v. Shackleton* [1912] 1 K. B. 22, 81 L. J. K. B. N. S. 34, 10 B. R. C.

105 L. T. N. S. 613, 5 B. W. C. C. 30). It did not provide for a "litigation," but an "arbitration" to ascertain the facts and settle the amount. As Farwell, L.J., said of the Act of 1897 in *Darlington v. Roscoe & Sons* [1907] 1 K. B. 219, at p. 230, the obligation of the employer was "a newly imposed statutory duty, —a duty which is wholly independent of any wrongdoing by the party to be charged, but is made by statute part of every contract of employment to which the act applies;" and again: "It is neither tort nor contract, but a statutory duty." This view is supported by the very recent decision of the Privy Council in *Workmen's Compensation Board v. Canadian Pacific Railway Co.* [1920] A. C. 184, at p. 191, 88 L. J. P. C. N. S. 169, [1919] W. C. & Ins. Rep. 289, 121 L. T. N. S. 662, 36 Times L. R. 3. Farwell, L.J., also quoted Lord Robertson, in an earlier case, to show that the proceedings contemplated by the act are not primarily judicial proceedings. And above all it must be borne in mind that, while it eliminated wrongdoing in any form as the basis of claim, and also eliminated the defenses—if such an expression as "defense" is appropriate to such a proceeding [583] —of common employment and assumption of risk, it did not throw the entire burden on the employer. *That burden, by reason of the limitation of compensation, is shared by the employer and the workman, as co-operators in their common enterprise.* That is a tacit adoption of status as the basis. In *Johnson v. Marshall, Sons & Co.* [1906] A. C. 409, at p. 412, 5 Ann. Cas. 630, Lord James of Hereford said: "The main object was to entitle a workman who sustained injury whilst engaged in certain employments to recover compensation from the employer, although he (the employer) was guilty of no default. The intention was to make 'the business' bear the burden of the accidents that arose in course of the employment, and relief from this liability is not found even if the injured workman be guilty of negligence. The doctrine of contributory negligence was superseded by the act." In *Brintons Ltd. v. Turvey* [1905] A. C. at p. 233, 2 Ann. Cas. 137, Lord Halsbury, L. C., said that "apart from negligence of any sort—either employers or employed—the industry itself should be taxed with an obligation to indemnify the sufferer for what was 'an accident' causing damage." The same

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economic view is stated by the Supreme Court of Massachusetts (*Duart v. Simmons* (1918) 231 Mass. 313, at p. 319, 121 N. E. 10. Having in view the nature of the act, it should not be construed in any narrow spirit (per Lord Loreburn, L. C., in *Low v. General Steam Fishing Co.* [1909] A. C. 523, at p. 532, 78 L. J. P. C. N. S. 148, 101 L. T. N. S. 401, 25 Times L. R. 787, 53 Sol. Jo. 763, and in *Trim Joint District School Board of Management v. Kelly* [1914] A. C. at p. 682, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 7 B. W. C. C. 274, 48 Ir. L. T. 141, Ann. Cas. 1915A, 104.

Approaching the question we have to decide, with these considerations in mind, the directly relevant provision is § 5, subs. 1, which both in England and in New South Wales runs as follows: "If in any employment, personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule"—"Schedule One" in the New South Wales Act. That subsection is plainly modeled, as to form, on insurance precedents. See, for instance, the language of Alderson, B., in *Theobald v. Railway Passengers Assurance Co.* (1854) 10 Exch. 45, at p. 58, 156 Eng. Reprint, 349, 2 C. L. R. 1034, 23 L. J. Exch. N. S. 249, 18 Jur. 583, 2 Week. Rep. 528, as to "in the course of" and "arising out of" in relation to a railway accident. It has been judicially recognized as akin to insurance. See per A. L. Smith, L. J., in *Smith v. Lancashire* [584] and *Yorkshire Railway* [1899] 1 Q. B. 141, at p. 143, 68 L. J. Q. B. N. S. 51, 47 Week. Rep. 146, 79 L. T. N. S. 633, 15 Times L. R. 64, and per Lord Haldane, L. C., in the *Trim Case* [1914] A. C. at pp. 678, 679. Sir Frederick Pollock, who was a member of the Royal Commission and of those who adopted Appendix V., says in his work on Torts, 10th ed., at p. 113, after referring to *Darlington v. Roscoe & Sons* (1907) 1 K. B. 219, 76 L. J. K. B. N. S. 371, 96 L. T. N. S. 179, 23 Times L. R. 167, that "in practice the real defendant is almost always an insurance company."

Having regard to the context, the history of the legislation, and the general scheme of the act, it would, in our opinion, be unduly narrowing the meaning of the word "accident" to restrict it

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always to some event of an abnormal nature, or to limit it to some event preceding the injury in point of time, distinct and separately recognizable in itself as an event, and detached or detachable from the injury itself,—“segregated,” to use Lord Johnston’s word in *Glasgow Coal Co. v. Welsh* (1915) 52 Scot. L. R. 798,—an event which might or might not be attended with injury, but in respect of which, if injury happens to follow, a claim arises. Such a restriction or limitation seems to us to narrow the primary meaning of “accident,” to depart from the scope and spirit of the legislation, and to fall short in a large measure of the object openly aimed at by the act. And this, for no reason that we can discover. As a remedial act, such a construction is all too narrow. According to the express words of the enactment it is to provide for risks “arising out of the employment,” which is a somewhat larger term than “incidental to the employment.” That narrower expression, as Lord Loreburn points out in the *Trim Case* [1914] A. C. at p. 682, “does not mean *merely* risks which ordinarily occur in it,” but it certainly includes such risks. And, having regard to the nature of the evils to be met and the language employed to meet them, it seems to us the narrower construction originally placed upon the act, and still in effect maintained in the judgment appealed against, is impossible of acceptance. At an early period the view was held that the word “accident” connoted some “fortuitous” element, in the sense of “abnormal” having regard to the ordinary course of the employment, an exclusion of everything ordinarily within the range of incidental risk. In *Hensey v. White* [1900] 1 Q. B. 481, 48 Week. Rep. 257, 69 L. J. Q. B. N. S. 188, 63 J. P. 804, 81 L. T. N. S. 767, 16 Times L. R. 64, it was so decided, and Collins, L. J., considered there must be something which, entering into the circumstances, [585] “turned a normal condition of affairs into a catastrophe.” That is exactly what the majority of the Supreme Court of New South Wales held in this case. But in *Fenton’s Case* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, that was held to be wrong, and it was held that “injury by accident” meant simply “accidental injury.” Lord Macnaghten’s exposition (which has now practically the force of an Act of Parlia-
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ment) seems to us to be clearness itself. It is needless to repeat his words, but we state his opinion in analytical form. It was: (1) The expression "injury by accident" is a compound expression, the words "by accident" qualifying the word "injury;" (2) the words "arising out of and in the course of the employment" qualify neither the word "injury" alone, nor the word "accident" alone, but the whole compound expression "injury by accident;" (3) "accident" and "injury," that is "injury by accident," are used where notice is spoken of, as convertible terms; (4) "accident," therefore, is used as denoting "an unlooked-for mishap or untoward event which is not expected or designed." In the first place, there is not a word about "abnormality." His Lordship rejects "fortuitous" so far as it denotes anything beyond "accidental," and then it is superfluous where that word is used. In the next place, segregation of accident and injury in the statutory sense is negatived. And *Hensey v. White, supra*, is declared to be wrong.

The House of Lords has repeatedly reaffirmed the correctness of that exposition. Substantially, every subsequent case on the subject in the House of Lords has been a decision against any limitation of the force of Lord Macnaghten's words properly understood, and in some cases there has been a distinct application of them to mishaps through the effect of ordinary work of the sufferer. We say "substantially" because the effect of *Lyons v. Woodilee Coal and Coke Co.* (1917) 117 L. T. N. S. 65, [1917] W. N. 151, 86 L. J. P. C. N. S. 137, 61 Sol. Jo. 490, 10 B. W. C. C. 416, has to be considered. In *Brintons Ltd. v. Turrey* [1905] A. C. at p. 231, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137, it was urged that though a "rupture" was an "accident," the inoculation of a man's eye with anthrax bacillus was not. The House (Lord Robertson dissenting) held the case one of accident. There Lord Macnaghten again, by a series of phrases, indicated what "accident" means,—phrases which, if anything were needed to make clearer his former [586] exposition, effectually do so. This case has one special point of interest. Lord Robertson thought that Lord Macnaghten's exposition of "accident" in *Fenton's Case, supra*, was *obiter* only, and observed that that learned

Lord had been "so enterprising as to hazard a definition." Lord Macnaghten himself, not only in *Brintons Ltd. v. Turvey* adhered to and amplified what he had said in *Fenton's Case*, but in a later case (*Clover, Clayton & Co. v. Hughes* [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885, made a distinct reference to Lord Robertson's observation. But it is most important to note that it was after *Brintons Ltd. v. Turvey*, which applied the wide interpretation to the provision, that the statute was not merely re-enacted, but was extended substantially to all employments. In *Ismay, Imrie & Co. v. Williamson* [1908] A. C. 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713, the House, by a majority, held that, *the ordinary work* of a stoker having suddenly overcome a workman in a weak condition of health, an accident had occurred. Lord Macnaghten dissented really on the facts, holding that the evidence led only to one conclusion; namely, that in such a physical condition the result to the stoker was only to be expected, and, therefore, could not be accidental. His reasoning in that case and his decision in the next show that he did not rest upon the doctrine of "abnormality" or "exceptional conditions." His dissent, however, makes the conclusion of the Lord Chancellor and Lord Ashbourne all the more striking. Lord Loreburn, referring to the workman's prostration and death from the heat stroke, said [1908] A. C. at p. 439, it was "an unlooked for mishap in the course of his employment. In common language, it was a case of accidental death."

In *Clover, Clayton & Co. v. Hughes, supra*, the House of Lords reiterated that "injury by accident" means simply "accidental injury." It was held that where, as the effect of mere *ordinary work*, an aneurism burst, unexpectedly so far as the workman was concerned, and the man died, that was an accident, and one arising out of the employment. Lord Loreburn, L.C., held. Lord Macnaghten's exposition in *Fenton's Case* as conclusive. Lord Macnaghten himself adhered to it, and said ([1910] A. C. at p. 248): "'Injury by accident' meant [587] nothing more than 'accidental injury' or 'accident,' as the word is popularly used." He added, with evident reference to what Lord
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Robertson had said in *Brintons Ltd. v. Turvey* [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137: "It is not perhaps quite accurate to say that in that case" (that is, *Fenton's Case*) "a definition of the term 'accident' was hazarded." He went on to observe that the decision was that "accident" was used in its ordinary popular sense, and that sense was stated. Lord Collins, who had been party to *Hensey v. White* [1900] 1 Q. B. 481, 48 Week. Rep. 257, 69 L. J. Q. B. N. S. 188, 63 J. P. 804, 81 L. T. N. S. 767, 16 Times L. R. 64, was one of the majority. *Trim Joint District School Board of Management v. Kelly* (1914) A. C. 667, 83 L. J. P. O. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 7 B. W. C. C. 274, 48 Ir. L. T. 141, Ann. Cas. 1915A, 104, was a decision as to the meaning of the words "unexpected" and "designed" in Lord Macnaghten's exposition. The House was bound by that exposition, whatever it meant. And it was held, and to a large extent on the wide scope of the act itself, that "unexpected" and "designed" in that exposition meant "unexpected" and "designed" by the workman himself. Lord Haldane, L.C., said [1914] A. C. at p. 679: "What the Legislature had in view as a general object to be attained was the compensation of the workman who suffers misfortune;" and "accident includes any injury which is not expected or designed by the workman himself." That represented the views of the majority, and is controlling. The learned Lord Chancellor also said he was confirmed in his view of the unrestricted rendering of the meaning of the word (accident) which he attributed to Lord Macnaghten by the case of *Clover, Clayton & Co. v. Hughes* [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885. The judgments of Lord Dunedin, Lord Atkinson, and Lord Parker really rested on the view that "accident," on the proper interpretation of Lord Macnaghten's exposition, is opposed to "design," whether it be the "design" of the workman himself or a stranger. The majority decision emphasizes the view that *the workman's status is the governing standpoint*. *Glasgow Coal Co. v. Welsh* [1916] 2 A. C. 1, *post*, 308, 85 L. J. P. C. N. S. 130, 114 L. T. N. S. 809, 32 Times L. R. 359, 60 Sol. 10 B. R. C.

Jo. 336, 9 B. W. C. C. 371, [1916] S. C. 141, 53 Scot. L. R. 311, was a comparatively plain case, in view of the finding of fact. But the reasons stated by the learned Lords are important. Lord Haldane's judgment shows that miscalculated action may have the character of unexpected or undesigned event, and therefore of "accident" in the statutory sense. Lord Kinnear supports Lord Macnaghten's exposition, and demonstrates that the original view [588] taken that the "accident" and the "injury" must be separate and distinguishable—in other words, that an "accident" must be a separate concrete occurrence—was disposed of by *Fenton's Case* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, and is wrong. Lord Shaw observes that the disease and its contraction can, and in that case did, stand together. Lord Wrenbury was emphatic on the same point, and called particular attention to the fact that the language of the act is not "personal injury by an accident" but "personal injury by accident," that is, "accidental personal injury." Lord Loreburn, L. C., previously stressed this in *Warner v. Couchman* [1912] A. C. 35, at p. 38, 81 L. J. K. B. N. S. 45, 105 L. T. N. S. 676, 28 Times L. R. 58, 56 Sol. Jo. 70, 5 B. W. C. C. 177, 49 Scot. L. R. 681. The very recent case of *Innes v. Kynoch* [1919] A. C. 765, 9 B. R. C. 478, 88 L. J. P. C. N. S. 85, 121 L. T. N. S. 39, 35 Times L. R. 392, 63 Sol. Jo. 444, 12 B. W. C. C. 78, 56 Scot. L. R. 345, is primarily on another phase, but that phase is the only qualification which, apart from the provision in subs. 2, the act appears to attach to the generality of the first subs. of § 5. The relevant provision in the New South Wales Act is subs. 2 of § 6. That requires notice to the employer containing (*inter alia*) "the date at which the accident happened." But although that was the point for decision in *Innes v. Kynoch*, yet, as each branch of subs. 1 of § 5 assists in determining the true meaning of every other branch of the whole composite provision (see per Lord Loreburn in *Clover, Clayton & Co.'s Case* [1910] A. C. at p. 244, prior decisions were greatly in point. The House (Lord Atkinson dissenting) held that *Brintons Ltd. v. Turvey*, *supra*, covered the question. Lord Birkenhead, L. C., regarded the principle governing the two cases, in view of present scientific knowledge, as practically one in law, 10 B. R. C.

and probably developmental in its operation, and the learned Lord Chancellor held that all that was necessary to constitute an "accident"—even an "accident of the date of which notice was to be given"—was that the injury should have been due to some particular occurrence happening at some particular time in the course of the employment. That it arose out of the employment and unexpectedly was assumed. Lord Buckmaster's review of the position supports the fullest application of Lord Macnaghten's words, consistently with the requirement as to notice, as to which his view accorded with that of the Lord Chancellor. Similarly Lord Parmoor and Lord Wrenbury stated the position with a view of harmonizing the provisions of the statute, [589] and agreed that the accidental cause of the disease must be located by the claimant "in the course of the employment." Lord Atkinson, who dissented, did so, as we gather [1919] A. C. p. 792, on the ground that the evidence did not satisfy the burden of proof resting on the claimant.

Further, the House of Lords has held that, where the injury occurs through a risk of the employment, the mere fact that in like circumstances, but outside the employment, the risk would be the same, does not exclude the case from the act (*Dennis v. A. J. White & Co.* [1917] A. C. 479, 86 L. J. K. B. N. S. 1074, 116 L. T. N. S. 774, 33 Times L. R. 434, 61 Sol. Jo. 558, 10 B. W. C. C. 280, Ann. Cas. 1917E, 325, 15 N. C. C. A. 294). The outstanding feature that marks the House of Lords' decisions, which we have summarized from *Fenton's Case* (1903) to *Innes's Case* (1919), is the broad view that the act covers all workmen's injuries that arise out of and in the course of their employment, provided only that (1) the injury is due to some accidental occurrence which is sufficiently ascertainable in point of time as to be indicated as arising in the course of the employment; and (2) the causal connection between the accidental occurrence and the injury is not, as a matter of common sense, too remote. If those conditions be satisfied, it is immaterial whether the accidental occurrence arising out of and in the course of the employment and producing the injury (1) is normal or abnormal in relation to the employment, or (2) is a risk that might arise outside the employment, or (3) has an external or an internal effect on the

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workman, or (4) causes a lesion or a loss of vitality unaccompanied by any other observable organic change, or (5) is or is not an event that can be segregated from the injury itself.

There remains to be considered the case of *Lyons v. Woodliles Coal and Coke Co.* (the most detailed report of which is found in the Law Times (1917) 117 L. T. N. S. 65). We have attentively considered that case in several reports, and we think that those reports, taken with the references to the case in the House of Lords in *Innes v. Kynoch*, by Lord Buckmaster [1919] A. C. at p. 777, and by Lord Atkinson [1919] A. C. pp. 785, 786, 790, indicate that the decision was that the necessary causal connection between the accidental occurrence there relied on and the injury sustained was not established, because, the arbitrator having found in fact against such causal connection, there was no sufficient reason [590] in law for reversing that finding. But that case, regarded negatively, did not determine that a chill, contracted accidentally by reason of an occurrence to which it could be attributed as a result not as a matter of common sense too remote, would be outside the act. Such a determination is not only not expressly stated, but would be in direct conflict with the series of decisions, some earlier and some later, to which we have referred. We do not agree with the argument that it controls this case. The broad principle of construction applied to the pioneer English legislation—in perfect accordance with the conclusion pointed to by its history—is equally applicable to the New South Wales Act. If that be accurate, the present case is a plain one. The long hours of work had apparently so reduced the man's powers of resistance that he was unable to withstand the effects of the cold air. Of the suddenness and unexpectedness of the attack there can be no question. No finding to the contrary could stand. There was no *gradual* development of injury as would take place, for instance, in lead poisoning in some trades, and which would preclude compliance with § 6, subs. 2. No one could contend that the result that occurred is an inevitable, or is even to be expected as a usual, occurrence.

In our view, on the facts as found by the learned district court judge, there was necessarily, on a proper construction of the act, "injury by accident." This is really the only question arguable.
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It follows from what we have said, that the view taken by Ferguson, J., was correct, and that the appeal should be allowed.

Gavan Duffy and Starke, JJ. (read by **Starke, J.**): Sec. 5 (1) of the Workmen's Compensation Act 1916, which reproduces § 1 (1) of the Workmen's Compensation Act 1906 (6 Edw. VII. chap. 58), is as follows: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the schedule one." In this case the learned district court judge was of opinion that the appellant, while working at his occupation as an hydraulic winch driver, through the effect of exposure to cold weather during a long continuous spell of work, sustained a sudden [591] and severe chill which in the ordinary course of the disease developed into pneumonia, and that the pneumonia so affected his arm that notwithstanding a surgical operation he became incapable of doing his ordinary work. The learned district court judge thought that these facts justified him in holding that the appellant had sustained an injury arising out of and in the course of the employment within the meaning of § 5 (1), but that they precluded him in law from holding that the injury was an "injury by accident." The question we have to determine is whether they did so preclude him. At one time it was thought that in order to substantiate a claim under the subsection it was necessary to prove two distinct things: First, such an unusual or unlooked for occurrence as would constitute an accident; and, next, personal injury as the result of such occurrence. This doctrine was considered and rejected in *Fenton v. J. Thorley & Co.* (1903) A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, where it was held that if the injury itself was an unexpected mishap it was an "injury by accident." "Unexpected" means unexpected by the person suffering the injury, not by the person inflicting it (*Trim Joint District School Board of Management v. Kelly* [1914] A. C. 667, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 7 B. W. C. C. 274, 48 Ir. L. T. 141, Ann. Cas. 1915A, 104). In *Clover, Clayton & Co. v. Hughes* [1910] A. C. 10 B. R. C.

at pp. 247, 248, Lord Macnaghten said: "My Lords, in this case your Lordships have heard a very able and ingenious argument upon the construction of the 1st section of the Workmen's Compensation Acts. I need hardly say that it is not from any want of respect to the learned counsel who advanced it that I pass that argument by. It has been disposed of already. It was advanced and rejected in the case of *Fenton v. Thorley, supra*. There the Court of Appeal had held that if a man meets with a mishap in doing the very thing he means to do the occurrence cannot be called an accident. There must be, it was said, an accident and an injury; you are not to confuse the injury with the accident. Your Lordships' judgment, however, swept away these niceties of subtle disquisition and the endless perplexities of causation. It was held that 'injury by accident' meant nothing more than 'accidental injury' or 'accident' as the word is popularly used."

In the case of traumatic injury the cause of the injury is almost [592] always plainly and immediately connected with the injury itself, and there can seldom be any room for an inquiry as to whether the injury sustained might have been anticipated as likely to result from the cause, indeed the combination of violent impact and physical injury caused by such impact together constitute what is popularly known as an accident; but, in the case of disease, the cause, and the relation between cause and effect, are often difficult and sometimes impossible to discover. This has led to confusion in the inquiry as to whether a person attacked by disease has sustained a "personal injury by accident" within the meaning of the subsection. Some judges have dealt with the composite phrase "injury by accident" and have endeavored to ascertain whether the injury could be called accidental, either because of the unexpected nature of the occurrence which caused it or of the unexpected nature of the operation of such occurrence in producing the injury. Others have segregated the word "accident" from the word "injury" and have considered whether the facts of the case established the existence of something which could be called "accident," or "an accident," as distinct from the injury. This diversity is well exhibited in the opinions delivered by the noble and learned Lords who concurred in thinking that the claimant in *Glasgow Coal Co. v. Welsh* [1916] 2 A. C. 1, *post*, —, 10 B. R. C.

85 L. J. P. C. N. S. 130, 114 L. T. N. S. 809, 32 Times L. R. 359, 60 Sol. Jo. 336, 9 B. W. C. C. 371, [1916] S. C. 141, 53 Scot. L. R. 311, was entitled to compensation. The workman was employed to bale out a large quantity of water which had accumulated at the pit's bottom owing to the break-down of a pump, and consequently contracted subacute rheumatism. Lord Haldane, L.C., said ([1916] 2 A. C. at p. 4): "In the present appeal it is clear that it must be taken that the arbitrator found conclusively that there was injury due to an event arising out of and in the course of the employment. The one question is whether, reading the award as a whole, this event could be in point of law an accident within the meaning of the act, for if so the arbitrator certainly had before him evidence on which he could find that it had happened. . . . I interpret the finding of facts as amounting to this,—that there was an entry into the cold water and prolonged exposure to it, the effects of which, being miscalculated, proved unexpectedly injurious. . . . This miscalculated action of entering the water in the present case must be taken to [593] have constituted a definite event which culminated in rheumatic affection. It was the miscalculation which imported into that event the character of an accident within the meaning of the act." Lord Kinnear said ([1916] 2 A. C. at p. 8): "The learned counsel for the appellants argued that in order to satisfy the act there must be some distinct event or occurrence which taken by itself can be recognized as an accident, and then that the injury must be shown to have followed as a consequence from that specific event. But this is just the argument that was rejected in *Fenton v. Thorley & Co. supra*. It is unnecessary to say more; but I venture to add that the argument seems to me to rest upon a misreading of the statute, which can only have arisen from a failure to give any exact attention to the actual words. The statute does not speak of an accident as a separate and distinct thing to be considered apart from its consequences, but the words 'by accident' are introduced, as Lord Macnaghten says, parenthetically to qualify the word 'injury.' The question, therefore, is whether the injury can properly and, according to the ordinary use of language, be called accidental." Lord Shaw said ([1916] 2 A. C. at p. 10): "Injury by accident is a composite expression.

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It includes a case like the present; namely, the contraction of disease, arising from extreme and exceptional exposure. This expression—contraction of disease—might also, no doubt, be analytically treated, and it might be said that the disease was the injury and its contraction the accident; but that carries the matter no farther, and in both cases the composite synthetic expression brings the events together just as they happen in life and in fact. This construction, besides being most simple, prevents the confusion that is apt to arise by the supposed difficulty of applying the act because the event cannot be fixed in date." Lord Wrenbury said ([1916] 2 A. C. at p. 12): "In each case the personal injury is not, and cannot be, the accident. It is the result of the accident. The phrase in the act is 'personal injury by accident.' In this and in every case the inquiry must be whether the personal injury which was sustained, was sustained in such a state of circumstances as that it was sustained 'by accident.' I call particular attention to the fact that the language of the act is not [594] 'personal injury of an accident,' but 'personal injury by accident.' This means, I conceive, personal injury, not by design, but by accident, by some mishap unforeseen and unexpected; accidental personal injury." Notwithstanding this diversity of treatment, the essential inquiry has always been the same; namely, whether the evidence showed that the attack was sudden and unexpected and was attributable to a specific cause; in other words, whether it disclosed the existence of what is popularly known as an accident.

It is said that the case of *Lyons v. Woodilee Coal and Coke Co.* (1917) 86 L. J. P. C. N. S. 137, 117 L. T. N. S. 65, 10 B. W. C. C. 416, is inconsistent with this view. The various reports of the case do undoubtedly give rise to some difficulty. A workman, having finished his night's work, went to the pit shaft to be taken to the surface just at the time when the daily statutory inspection of the shaft was beginning. Usually the inspection took about an hour, but on that morning, owing to a break-down of the bell wire and certain necessary repairs, the cage took an unusually long time in coming down, and the workman remained at the bottom of the shaft exposed to a current of cold air. In consequence he contracted a chill, from the effects of which he died. The arbitrator found in fact and in law that the workman was not injured by

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accident arising out of and in the course of his employment. The arbitrator stated the following question of law for the opinion of the court: "On the facts stated could I competently find that the deceased workman was not injured by accident arising out of and in the course of his employment?" Ultimately the case reached the House of Lords, and their Lordships upheld the decision of the arbitrator. In the first place, their Lordships took the view that the arbitrator had, on the facts stated, found that the injury arose out of and in the course of the deceased's employment but was not by accident. It is true, we think, that their Lordships held that the injury—the chill—was not sufficiently connected with and consequent upon the break-down of the bell wire. But it is more difficult to explain why the unexpected results of the occurrence were not so unexpected and unlooked for from the workman's point of view as to be considered accidental. "The question of the existence of the personal injury and of its cause or causes is one of fact, but [595] 'the question whether such cause or causes amount to an accident within the meaning of the act is a question of law on which the decision of the county court judge is not final; and is not a question of fact on which his decision is not open to appeal'" (Willis's Workmen's Compensation Act, 18th ed., p. 5; *Fenton v. J. Thorley & Co.* [1903] A. C. at p. 453, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, per Lord Lindley). In *Lyons's Case* the injury and its causes were set out by the arbitrator in some detail, and we conclude, on the facts so stated, that their Lordships were of the opinion that the arbitrator's finding that there was not in fact an injury by accident was not contrary to the facts stated in the case, and so were bound to support it. It is clear that their Lordships in *Lyons's Case* did not in any way depart from the principles of law, or rather of construction, laid down in *Fenton's Case* and in *Clover's Case* [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 313 W. C. C. 275, 47 Scot. L. R. 885, and therefore the decision in *Lyons's Case* must be treated as a decision upon the facts actually found in that case. But a decision upon the findings of fact in one case cannot and ought not to govern the decision in another case in

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which the facts are not identical. *Lyons's Case* does not, therefore, cover this case.

In *Innes v. Kynoch* [1919] A. C. 765, 9 B. R. C. 478, 88 L. J. P. C. N. S. 85, 121 L. T. N. S. 39, 35 Times L. R. 392, 63 Sol. Jo. 444, 12 B. W. C. C. 78, 56 Scot. L. R. 345, a workman employed in handling artificial manure, consisting mainly of bone dust, died from blood poisoning caused by his becoming infected through an abrasion on his leg by certain noxious bacilli, which were present in large numbers in bone dust, but were also found in the air and other substances, though in a much lesser degree. It did not appear when or how he received the abrasion, and it was impossible to say with certainty when the infection occurred. The arbitrator found, as the result of the medical evidence, that the infection which caused the illness was derived from the poisonous germs contained in the bone dust which the deceased handled in the course of his employment, and awarded compensation under the Workmen's Compensation Act 1906. The House of Lords declared the claimant entitled to compensation, and Lord Birkenhead, L. C., [1919] A. C. at p. 772, thus summarizes what must be proved to establish the existence of "an injury by accident arising out of and in the course of the employment": "I may add that the decision of the second division against the claim was founded on [596] the fact that the particular time and the particular place at which the contact of the abraded surface with the poisonous matter took place cannot be definitely ascertained. It is no doubt the fact that in *Brintons' Case* [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137, a particular time was found as being that at which the contact had occurred. But all that is material is that the infection should have been the result of contact at some one particular time, and that this one particular time should have been during the course of the employment. Some expressions, such as those referred to in the judgment of the second division, have been from time to time used, but none of them are binding upon this House; and indeed when these various expressions are examined in connection with one another they appear to me to come to no more than this, that it must be established that the disease is due to some particular occurrence, other-

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wise it cannot be the result of accident. That it should be some particular occurrence happening at some particular time is essential, otherwise it is not in the nature of an accident. What that particular time was is immaterial so long as it reasonably appears that it was in the course of the employment."

In this case we think that the facts found by the arbitrator do in point of law constitute an injury by accident within the meaning of the statute. The combination of circumstances and the results are so unexpected and unlooked for from the workman's point of view that they may properly be described as accidental. The learned arbitrator was of opinion that he was precluded in point of law by certain cases from holding that the occurrence was accidental, and in this we think he was in error.

This court should, therefore, declare that the appellant is entitled to compensation in accordance with the earnings of the workman agreed upon by the parties.

Appeal allowed. Order appealed from set aside.

Decision of the arbitrator reversed. Declare that the appellant was entitled to compensation under the Workmen's Compensation Act 1916 in accordance with his earnings as [597] admitted. Respondent to pay costs in High Court and in Supreme Court. Proceedings remitted to district court judge to award in accordance with foregoing declaration, and to make such order as to costs of appellant of original hearing and further hearing as he shall think just.

Solicitor for the appellant, *J. B. Moffatt.*

Solicitor for the respondent, *W. J. Creagh.*

Note.—Chill as an accident within workmen's compensation acts.

Where a break-down, or something unusual, or out of the normal, has occurred incident to the employment, subjecting a workman to exposure, by reason of which a chill and consequent illness followed,
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it has been held in some cases that there was an injury by accident within the meaning of the workmen's compensation acts. *United Paperboard Co. v. Lewis* (1917) 65 Ind. App. 356, 117 N. E. 276; *Alloa Coal Co. v. Drylie* [1913] W. C. & Ins. Rep. 213, 6 B. W. C. C. 398, [1913] S. C. 549, 50 Scot. L. R. 350, 1 Scot. L. T. 167, 4 N. C. C. A. 899; *Brown v. Watson* [1915] A. C. 1, 7 B. W. C. C. 259, [1914] W. N. 195, 83 L. J. P. C. N. S. 307, 111 L. T. N. S. 347, 30 Times L. R. 501, 58 Sol. Jo. 533, [1914] S. C. 44, 51 Scot. L. R. 492, reversing [1913] S. C. 593, 6 B. W. C. C. 416, 50 Scot. L. R. 415.

Thus in *United Paperboard Co. v. Lewis*, *supra*, it was held that a workman had suffered an injury by accident within the provision of the Indiana Act, where an accident to a pipe rendered it necessary to flush steaming pulp out of a basement, in doing which he became overheated, and while overheated came in contact with the open air, which caused him to chill for several days, and to suffer from acute nephritis, resulting in disability. The court said: "The Workmen's Compensation Act of this state makes provision for the payment of compensation for personal injury or death by accident to an employee, arising out of and in the course of his employment. Appellant first contends that the evidence shows that the disability of which appellee complains is the result of a disease, and not of an accident within the meaning of such act. Repeated efforts have been made to define an 'accident' as used in similar acts in various jurisdictions, but the definitions are not uniform. One frequently approved defines an accident to be 'an unlooked for mishap, an untoward event which is not expected or designed.' The courts have also differed as to whether a disease following an employment should be considered an injury by accident within the meaning of such acts. In the various decisions on this subject it is generally recognized that diseases are of two classes,—First, the so-called industrial or occupational diseases, which are the natural and reasonably to be expected results of a workman following a certain occupation for a considerable period of time; second, diseases which are the result of some unusual condition of the employment. The first class is illustrated by lead poisoning and the second by pneumonia following an enforced exposure. As a rule such industrial or occupational diseases are not considered as injuries by accident, and in the absence of special statutory provision compensation is not allowed therefor. On the other hand it is generally accepted that a disease, which is not the ordinary result of an employee's work, reasonably to be anticipated as a result of pursuing the same, but contracted as a direct result of unusual circumstances connected therewith, is to be considered an injury by accident, and comes within the provisions of acts providing for compensation for per-

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sonal injury so caused. . . . In the instant case it is clearly apparent that appellee contracted the disease which caused the disability for which he seeks compensation, as the direct result of an unusual circumstance connected with his employment. His duties required him to keep the basement room clean, but this did not ordinarily require him to flush hot steaming pulp into the sewer with hot water from the exhaust of the engine. It is evident that this was only required when the iron pipe through which such pulp was conducted broke and allowed it to escape to the floor. Hence the industrial board may have very properly found that the breaking of the pipe created an unusual condition under which appellee was required to work at the time in question, resulting in enforced exposure. In such event, any disease, of which such exposure is shown to have been the cause, may properly be said, under the rule stated, to constitute a personal injury by accident, and to come within the provisions of the Workmen's Compensation Act of this state."

And it has been held that a miner suffered an accident where, because of a wreck in a shaft, he was obliged to wait an hour and a half at the downcast shaft; which subjected him to a draft, resulting in a chill and pneumonia, from which he died. *Brown v. Watson, supra*. This case was held not distinguishable from *Alloa Coal Co. v. Drylie, infra*, Lord Dunedin saying: "My Lords, on the assumption that the case of *Alloa Coal Co. v. Drylie* was well decided, I am of opinion that this case is ruled by that decision; and I cannot help thinking that, in perusing the opinion of Lord Salvesen, that that learned judge took the same view, although he did not wish to express a formal dissent from the view of the other members of the second division. It seems to me that here, as there, you have an accident interfering with the regular working of the mine; the consequential exposure of the workman to rigorous climatic conditions for a prolonged period, which exposure would not have been his fate but for the accident; and the finding in fact that the supervening illness was due to this prolonged exposure. There is no intervening circumstances depending on some cause other than the accident which occurs to break that chain of causation. I will illustrate what I mean by referring to the case of *McLucky v. John Watson* [1913] S. C. 975, 50 Scot. L. R. 770, 6 B. W. C. C. 850, where a wetting, which brought on a chill, was not a necessary sequel of the accident, but was due to the workman's determination not to await his turn for the cage, but to stand in the water in order to get in front of his fellows."

In *Alloa Coal Co. v. Drylie* [1913] W. C. & Ins. Rep. 213, where, owing to a defective pump, water began to accumulate and miners became alarmed, left work, and reached the pit bottom in a heated condition, and the cage did not descend in reply to their signals
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for twenty minutes, during which time they stood in the water up to their knees, and one of them became chilled and pneumonia followed, resulting in his death, it was held that his death was due to an accident. Lord Salvesen dissented on the ground that there was no case where a death from disease such as pneumonia had been held to be a death resulting from injury by accident, because it might be, with more or less probability, attributed to an accidental exposure to wet or cold, and said: "The pneumonia itself did not develop for nearly a week, and I do not think the inference which the arbitrator drew was warranted by the facts he has stated; unless indeed the fact that a man has caught a cold during his work from which he never recovers until pneumonia supervenes is a ground for inferring that the circumstances which produced the cold also produced the supervening pneumonia, however long the interval that elapsed."

In some cases, however, although there was an unusual happening incident to the employment and an employee suffered a chill, it has been held that there was not an injury by accident within the meaning of the Workmen's Compensation Statute. *Lyons v. Woodilee Coal & Coke Co.* [1916] S. G. 719, 53 Scot. L. R. 538, 9 B. W. C. C. 655, affirmed in [1917] W. N. 151, 10 B. W. C. C. 416, 86 J. K. P. C. N. S. 137, 117 L. T. N. S. 65, 61 Sol. Jo. 490; *McLuckie v. John Watson*, *supra*.

Thus in *Lyons v. Woodilee Coal & Coke Co. supra*, it was held that a miner did not suffer an accident where he contracted a chill and cold, resulting in his death, while waiting for half an hour at the foot of a shaft for the cage, the delay being due to a break-down. Lord Mackenzie said: "On the facts as found it appears to me that the pit was being worked on the particular morning in question in a perfectly normal way, and the fact that the cage took an hour longer than usual to reach the bottom cannot be regarded as an occurrence of an unusual or unexpected character. Nor can the break-down of the bell wire be so regarded. That was just one of the occurrences which was to be expected in the pit, and the object of making the statutory inspection of the shaft was that such a break-down might be repaired. Therefore, unless we are to hold that it is a particular event or occurrence of an unusual or unexpected character when a man catches cold, I am unable to see how the appellant can establish a right to compensation."

And in *McLuckie v. John Watson, supra*, where a miner contracted a chill, and became incapacitated, as the result of standing in the water for half an hour at the pit bottom waiting for the cage, instead of waiting on dry ground until his turn, it was held that it could not be said to be an accident arising out of the employment, although the water at the pit was due to the pump
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breaking down. The Lord President said: "In the *Alloa Coal Co. Case* the pit was flooded through an accident, and was flooded to such an extent that the men thought they were in danger of their lives, and rushed to the pit bottom in order to get up to the surface—not at the ordinary time and in the ordinary course of their business, but, as they thought, in order to escape from drowning. While there they were subjected to a severe wetting, and the learned sheriff substitute, who acted as arbiter in the case, came to the conclusion that the disease of which the man died was contracted through the exposure to which he was then subjected. In that case it was held that there had been an accident, and that it occurred out of and in the course of the employment. But what do we have here? We have, I agree, an accident in this way, that the pump broke down and there was water at the pit bottom; but there is no suggestion that there was the slightest danger to anybody owing to the amount of water at the bottom of the pit. The men were going up to the surface when their work was done, in the ordinary way, and, if each man had waited his turn, he would only have got his feet wet in getting to the cage—or, as the learned sheriff substitute says, if they had been anxious not to get their feet wet, they could have avoided even that to a large extent by crawling over some hutches which were pushed towards the cage. Instead of waiting their turn the workmen were all anxious to get to the cage at once, and this man walked into the water and stood there for at least thirty minutes, and, in consequence of that, the sheriff substitute thinks it is probable that he got the chill which caused the infirmity from which he suffered. It seems to me impossible to say that that was an accident which arose out of and in the course of the employment, and it is futile to say—as was pleaded by counsel—that the workman might have been just as ill if he had had an ordinary wetting of his feet instead of voluntarily staying in the water for thirty minutes. I think that the case is an exceedingly clear one, and that the learned sheriff substitute's decision must be upheld." This decision was distinguished in *Brown v. Watson, supra*, on the ground that in the *McLuckie Case* there was an intervening cause; that is, the miner's determination to stand in the water to get in front of his fellows, instead of remaining where it was dry and taking his turn.

And pleurisy following a chill, after a canvasser and collector of accounts had become overheated in climbing three flights of stairs, has been held not to be an accident. *McMillan v. Singer Sewing Mach. Co.* (1913) 50 Scot. L. R. 220. The Lord President said: "Looking at this as a plain man, I think that nothing could be further removed from an accident than what happened in this case. All that the claimant can say is that in the course of his ordinary

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work he got overheated,—he got, as he puts it, sweated,—and that when he got home he felt he had contracted a chill, and afterwards found he was suffering from pleurisy. I must say that, until I am compelled to say so by a higher tribunal, I shall never admit that such a thing as this is an accident.”

Although there was no unusual happening incident to the business, it will be observed that in the reported case (*MAGUIRE v. UNION S. S. Co. ante*, 161), the court decided that the workman's injury was an injury by accident, where it appeared that after he had worked through a long, but not unusual, shift as winchman in an exposed place, he suffered a chill, resulting in pneumonia and the loss of the use of his arm.

The decision here reached gives a liberal construction to the Workmen's Compensation Act, but appears to be rather an advanced conclusion.

In *Sheerin v. Clayton* [1910] 2 Ir. R. 105, 44 Ir. L. T. 23, 3 B. W. C. C. 583, it was held that inflammation of the kidneys, caused by a chill from being obliged to work in water for a fortnight, constituted an injury by accident. J. T. W.

[ENGLISH KING'S BENCH DIVISION AND COURT OF APPEAL.]

IN RE AN ARBITRATION BETWEEN HOOLEY HILL RUBBER & CHEMICAL COMPANY, LIMITED, and ROYAL INSURANCE COMPANY, LIMITED and Others.

[1920] 1 K. B. 257.

Also reported in 89 L. J. K. B. N. S. 179, [1920] W. C. & Ins. Rep. 31, 25 Com. Cas. 23, 122 L. T. N. S. 173, 36 Times L. R. 81.

Insurance — Exception — Explosion — Fire causing explosion.

Insurers of property used for manufacturing explosives are, by the terms of the policies, exempted from liability for damages caused by an explosion of T-N-T, which occurred on account of heat from a fire which had been burning on the premises for some time, where such policies insure against loss by fire, and contain conditions that they shall not cover loss or damages by explosion, except explosion of illuminating gas, and also contain a memorandum that they shall not cover loss or damages by explosion or loss by fire following any explosion, unless it is proved that the fire was not caused directly or indirectly thereby, or was not the result thereof.

Stanley v. Western Insurance Co. (1868) L. R. 3 Exch. 71, 37 L. J. Exch. N. S. 73, 17 L. T. N. S. 513, 16 Week. Rep. 369, approved and followed.

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— Representation as to effect of policy — Fact or law — Estoppel.

The agent's representation was one of law, and not of fact, and the insurer was not thereby estopped from defending on the ground that the loss was caused by explosion, where during negotiations, in answer to the manufacturer's inquiry whether the ordinary policy covered damage by explosion following a fire, he quoted a condition of the policy that it did not cover loss by explosion, except of illuminating gas, and stated that damage caused by explosion resulting from a fire would be covered by the ordinary policy, save that loss or damages as specified in the condition would be excepted, although the manufacturer understood the qualification to refer only to an explosion due to hostile action, "loss or damage occasioned by foreign enemy" being an excepted risk. Per Bailhache, J., in the Divisional Court.

(October 20, 1919.)

[258] AWARD in an arbitration stated in the form of a special case.

Differences having arisen between the Hooley Hill Rubber & Chemical Company, Ltd. (hereinafter called "the assured"), and the Royal Insurance Company, Ltd., and three other insurance companies (hereinafter called "the insurance companies"), in respect of the liability of the insurance companies for a claim made against them by the assured under certain policies of insurance, these differences were referred to Mr. A. M. Langdon, K.C., as sole arbitrator, who stated his award in the form of this special case.

At all material times the assured carried on business as manufacturers of an explosive, tri-nitro-toluol, at Ashton-under-Lyne, on premises which they had built and adapted for that purpose.

The assured had taken out policies of insurance by which the insurance companies agreed to pay specified amounts if the property or any part thereof should be destroyed or damaged by fire. Condition 3 of the policy of the Royal Insurance Company provided:—

"This policy does not cover . . . loss or damage occasioned by or in consequence of invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, or any military or usurped power whatsoever, earthquake, volcano, or subterranean fire, nor loss or damage by explosion, except loss or damage caused by explosion of illuminating gas elsewhere than on premises in which gas is manufactured or stored."

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The other companies' policies contained a similar condition. The condition in each case is hereinafter referred to as condition 3. There was also the following typewritten memorandum indorsed on each of the policies:—

"This policy does not cover loss or damage by explosion nor loss or damage by fire following any explosion unless it be proved that such a fire was not caused, directly or indirectly, thereby, or was not the result thereof."

On June 13, 1917, during the currency of the policies, a fire broke out in the works of the assured. It burnt fiercely, doing great damage, for some twenty minutes. Then an [259] explosion took place which shattered the premises. The explosion occurred by reason that a quantity of tri-nitro-toluol contained in closed receptacles was exposed to the intense heat of the fire. It is common knowledge that under these conditions tri-nitro-toluol is certain to explode.

The arbitrator assessed the loss sustained by the assured up to the time of the explosion at the sum of 12,740*l.* The loss sustained by the assured in consequence of the fire and the explosion together amounted to a sum far in excess of the aggregate amount of the sums insured by the policies.

The insurance companies admitted liability to indemnify the assured for the loss in consequence of the fire, but denied liability for the loss consequent upon the explosion on the ground that condition 3 and the memorandum indorsed on the policies excepted them from that liability.

The assured contended that under the policies they were entitled to be indemnified, not only in respect of the loss caused by the fire, but also in respect of the loss caused by the explosion, on the ground that the explosion was an incident in the course of the fire, which was the proximate cause of the whole loss.

The arbitrator directed himself on the authority of *Stanley v. Western Insurance Co.* (1868) L. R. 3 Exch. 71, 37 L. J. Exch. N. S. 73, 17 L. T. N. S. 513, 16 Week. Rep. 369, that he was bound to find that the contention of the insurance companies was well founded, and that the contention of the assured could not prevail.

A further contention was advanced by the assured—namely,
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that the Royal Insurance Company were estopped from denying that they were liable under their policy to indemnify the assured against the loss which arose from the explosion.

Upon this point the arbitrator arrived at the following conclusions of fact and law:—

In 1915 the assured were organizing their factory for the manufacture of tri-nitro-toluol, and were negotiating with the Royal Insurance Company as to the insurance to be effected, and in particular as to the sum to be insured and the kind of risks to be covered. The negotiations were conducted [260] by correspondence with the manager of a sub-branch of the Royal Insurance Company. There were no interviews between the parties. Early in 1915 the assured had obtained from the Royal Insurance Company a cover against the risk of fire, subject to the usual conditions of their policies, until the policy was prepared. On September 27, 1915, the assured wrote to the manager asking whether they were covered by ordinary fire insurance should an incendiary bomb, or any bomb, be dropped on their works and cause an outbreak of fire. The manager wrote in reply on September 28 that the position might be most clearly shown by quoting condition 3 on the company's policy, and he set out in his letter the terms of condition 3. On reading that letter the assured were desirous of determining their position in case an explosion followed a fire and contributed to the damage done by the fire. Accordingly on October 12 the assured wrote to the manager, asking whether in that event they would be covered by ordinary fire insurance for that damage, and on October 13 the manager replied as follows: "In reply to your inquiry, we have pleasure in advising that damage caused by an explosion resulting from a fire would be duly covered by an ordinary fire policy, with the qualification, of course, that loss or damage as specified in condition 3 of our policies (quoted in our letter of the 28th ulto.) would still be excepted." By that letter the agent intended to inform the assured as to the legal effect of the policies to be issued in due course by the Royal Insurance Company. The assured understood the letter as a notification that they were in fact covered against loss caused by an explosion following a fire, other than an explosion due to enemy action, and they were in fact induced by the letter to limit

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their insurance against loss caused by an explosion following a fire to the policies about to be issued by the Royal Insurance Company. Consequently the assured did not cover themselves by taking out a further policy against loss of that kind. The statements in the letter of October 13 were repeated in a further letter from the manager dated December 23, 1915. Cover notes were from time to time sent by the Royal Insurance Company to the assured, and on March 1, [261] 1916, the policies were received by the assured and retained without question. The assured were well aware that an outbreak of fire in a factory for the making of trinitro-toluol is almost certain to cause an explosion, if the fire attacks receptacles in which the explosive is inclosed. These receptacles in one form or another are a necessary part of the plant required in the manufacture of the explosive.

The arbitrator directed himself in law that the letters of October 13 and December 23 were observations of an officer of the Royal Insurance Company during the negotiations of the policies as to the legal effect of the policies about to be issued, and that, therefore, no estoppel arose against the company to prevent them from relying upon the true meaning of the policies legally construed. He awarded that the insurance companies should severally pay the assured the following sums—namely, the Royal Insurance Company to pay 5,096*l.*, and each of the other three companies 2,548*l.*, making a total of 12,740*l.*

Douglas Hogg, K.C., and McCleary, for the assured. The first question is whether the exception in the policies of loss or damage by explosion is an exception which exempts the companies from liability for damage caused by an explosion which occurs in the course of a fire. Where there is both a fire and an explosion, if the proximate cause of the loss is the fire, and the explosion is only incidental to the fire, the exception clause does not apply. On the other hand, if there is an explosion followed by a fire, the companies would be protected. *Stanley v. Western Insurance Co.* (1868) L. R. 3 Exch. 71, 37 L. J. Exch. N. S. 73, 17 L. T. N. S. 513, 16 Week. Rep. 369, is distinguishable on the facts, for in that case the explosion was the proximate cause of the damage and loss, whereas in the present case the fire was the proximate

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cause. The damage done by the explosion was just as much a consequence of the fire as would be damage caused by water in attempting to extinguish a fire, or by the intentional destruction of a neighboring house by explosion for the purpose of checking the progress of the flames.

[262] The second question is whether the Royal Insurance Company are estopped by the statements in the manager's letters from relying on the exception. The statements were a representation of fact,—namely, that the assured was protected by the company's policy against damage by explosion, unless caused by enemy action. It was not a question of the legal construction or meaning of the policy, for the assured had not at that time seen the policy, and the reference to condition 3 was given in order to show that loss by enemy action was excepted. [*West London Commercial Bank v. Kitson* (1884) 13 Q. B. Div. 360, 53 L. J. Q. B. N. S. 345, 50 L. T. N. S. 656, 32 Week. Rep. 757, was referred to.]

R. A. Wright, K.C., and Keogh, for the insurance companies, were called upon to argue the second question only. To give rise to an estoppel there must be a representation as to an existing fact. The only representations here were as to the legal effect of the company's policy, the material clause of which was before the assured at the time, and when they subsequently received the policy it was retained without comment. A misrepresentation as to a point of law cannot give rise to an estoppel, assuming the parties to be on an equal footing. *Beattie v. Lord Ebury* (1872) L. R. 7 Ch. 777, 41 L. J. Ch. N. S. 804, 27 L. T. N. S. 398, 20 Week. Rep. 994.

McCleary replied.

Bailhache, J.: This case raises two questions for the opinion of the court. The first question is whether the insurance companies are liable under their policies for the damage caused by the explosion. [The learned judge read condition 3 and the memorandum indorsed on the policies.] In my opinion the case is indistinguishable from *Stanley v. Western Insurance Co.* (1868) L. R. 3 Exch. 71, 37 L. J. Exch. N. S. 73, 17 L. T. N. S. 513, 16 Week. Rep. 369, which was decided fifty years ago and which is 10 B. R. C.

binding on me. Upon the authority of that case I hold that the insurance companies are right in saying that their policies do not cover the loss caused by the explosion in the circumstances of this case. The second question, which affects the Royal Insurance Company only, is whether the company are, by reason of certain representations made by their manager, estopped from denying that their policy [263] covers the loss which happened. In order to ascertain whether there is an estoppel I have to consider the letters which passed between the assured and the company's manager. [The learned judge read the letters set out above and continued:] Now, what meaning would those letters convey to an ordinary intelligent business man? I think they would convey the impression that such a loss as in fact happened was covered by the ordinary form of policy. It is true that the assured are referred to condition 3, but having regard to the earlier letters and to the fact that they were referred to that clause when asking about an incendiary bomb, I think an ordinary business man would understand the letters to mean that he was covered if a fire occurred which caused an explosion, but that he was not covered if the explosion was due to an incendiary bomb. If that is the meaning of the letters, or is the sense in which they ought to be understood, does that create an estoppel? If the statement was a statement of an existing fact, independent of any question of construction of a written document which would be a question of law, or partly of law and partly of fact, I think there would be an estoppel. But in my judgment, though the matter does not seem to me to be free from doubt, the writer of the letters was putting a construction upon the ordinary form of his company's policy, and he was telling the assured that in his opinion the policy did cover such an explosion as occurred in this case. If he had merely said that the ordinary form of policy did cover it, and had not referred to condition 3, I should have had even more doubt about the matter. But while expressing his opinion about it, and saying that as a matter of construction the assured were covered, he referred them to the very clause which, according to the construction placed upon it in *Stanley v. Western Insurance Co. supra*, does not cover the loss in question. I think the true position is that the writer was not stating a positive existing fact, but that he was giving

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ing his view as to the meaning of a policy which contained this particular clause. His view was a mistaken one, but the assured accepted it as accurate, and [264] indeed, if it were not for *Stanley's Case*, I think there would be a good deal to be said in support of that view. I think that the arbitrator was right in holding that there was no estoppel. The award, therefore, will stand. I express no opinion as to whether the assured could successfully claim rectification of the policy.

Award upheld.

The assured appealed.

[The question of estoppel was not raised in this appeal, the assured and the Royal Insurance Company having come to terms upon that matter.]

Hogg, K.C., and McCleary, for the appellants. It is a general rule in the law of insurance that an ambiguous clause in a policy is to be construed against rather than in favor of the insurers. *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.* [1909] 1 K. B. 591, 6 B. R. C. 517, 78 L. J. K. B. N. S. 684, 100 L. T. N. S. 568, 25 Times L. R. 287, 53 Sol. Jo. 266; *In re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 K. B. 415, 81 L. J. K. B. N. S. 523, 105 L. T. N. S. 919, 28 Times L. R. 175. They must not leave the question of their liability in doubt. They prepare the form of the policy. If they fail to protect themselves by their exceptions in clear terms they must make good the loss. In the present case, apart from condition 3 and the memorandum, the respondents would be liable. The property was destroyed by fire. Condition 3 and the memorandum except from the risk loss or damage by explosion. The result is that if the loss or damage was caused by fire the respondents are liable; if they were caused by explosion the respondents are exempt from liability. The tribunal in such cases has to discover the proximate cause of the loss, bearing in mind that the proximate cause does not mean that which is nearest in point of time to the disaster, but means the real or efficient or dominant cause of the loss. *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* [1918] A. C. 350, 87 L. 10 B. R. C.

J. K. B. N. S. 395, 118 L. T. N. S. 120, 34 Times L. R. 221, 62 Sol. Jo. 307, 23 Com. Cas. 190, 14 Asp. Mar. L. Cas. 258. In this case the fire was the real, efficient, or dominant cause: "The proximate cause is the efficient cause,—the one that [265] necessarily sets the other causes in operation." *Washburn v. Farmers' Insurance Co.* (1880) 2 Fed. 304, citing *Insurance Co. v. Boon* (1877) 95 U. S. 117, 130, 24 L. ed. 395, 398. At the least, fire was, equally with explosion, the cause of the loss, and that is enough to entitle the appellants to recover. *Reischer v. Borwick* [1894] 2 Q. B. 548, 63 L. J. Q. B. N. S. 753, 9 Reports, 558, 71 L. T. N. S. 238, 7 Asp. Mar. L. Cas. 493. There are four possible cases: (1) Fire without explosion, which is plainly within the policies; (2) explosion without fire, which is plainly within the exception; (3) fire following explosion, which is dealt with by the memorandum; (4) explosion following fire, which is not specially dealt with, but which is within the policy because the loss or damage was the result of a fire. Bailhache, J., felt himself bound by *Stanley v. Western Insurance Co.* (1868) L. R. 3 Exch. 71, 37 L. J. Exch. N. S. 73, 17 L. T. N. S. 513, 16 Week. Rep. 369. The decision in that case is unsatisfactory and ought to be overruled. The judgment of Kelly, C. B., is inconsistent. The Chief Baron agrees that if, with a view to checking a fire, a neighboring house were destroyed intentionally by explosion, the damage done by the explosion would be recoverable under the policy in that case, and that, "in a word, every loss that clearly and proximately results, whether directly or indirectly, from the fire, is within the policy." If that damage was within the policy, *a fortiori* damage by explosion occurring in the course of a fire was within the policy. Yet the Chief Baron held that this damage was within the exception. This decision has not found favor in America. *Transatlantic Fire Insurance Co. v. Dorsey* (1880) 56 Md. 70, 40 Am. Rep. 403; *Washburn v. Farmers' Insurance Co. supra*; *Renshaw v. Missouri State Mutual Fire and Marine Insurance Co.* (1890) 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 945. The proximate cause is often the earliest in point of time. In *Etherington's Case* [1909] 1 K. B. 591, 6 B. R. C. 517, 78 L. J. K. B. N. S. 684, 100 L. T. N. S. 568, 25 Times L. R. 287, 53 Sol. Jo. 266, an accident policy was effected against bodily injury

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caused by violent, accidental, external, and visible means, and it was provided that the policy only insured against death where accident within the meaning of the policy was the direct or proximate cause thereof, but not where the direct or proximate cause thereof was disease, even though aggravated by the accident. The assured met with an accident, developed [266] pneumonia, and died. It was held that the accident was the proximate cause of death. In *Leyland Shipping Co. v. Norwich Union Fire Insurance Society, supra*, a ship was insured against perils of the sea, but the policy was warranted free from all consequences of hostilities. The ship was torpedoed by a German submarine. She was brought to Havre disabled and moored in the outer harbor, where, after taking the ground at every low tide, she became a total loss. It was held that hostilities, and not perils of the sea, were the proximate cause of the loss. In the present case the explosion was not a new cause intervening. The real cause of the loss or damage was the fire. If it is not clearly shown that the real cause was the explosion the appellants are entitled to recover.

Sir John Simon, K.C., R. A. Wright, K.C., and Keogh, for the respondents. The effect of excepted warranties in a policy of insurance has to be considered in this case. The respondents admit that, but for the exceptions, loss by explosion in the course of a fire would be covered by these policies. On the same principle in *Cory v. Burr* (1883) L. R. 8 App. Cas. 393, 52 L. J. Q. B. N. S. 657, 49 L. T. N. S. 78, 31 Week. Rep. 894, 5 Asp. Mar. L. Cas. 109, the seizure by the Spanish government would have been covered by the policy in that case against barratry of the master, which led to the seizure; and in *Lawrence v. Accidental Insurance Co.* (1881) L. R. 7 Q. B. Div. 216, 50 L. J. Q. B. N. S. 522, 45 L. T. N. S. 29, 29 Week. Rep. 802, 45 J. P. 781, a policy against accidents was held to cover death by an accident which happened to the assured while in a fit. On the other hand loss by explosion independent of fire would not be within the purview of the policy at all. Then what is the meaning of the exception in condition 3, "This policy does not cover . . . loss or damage by explosion?" The intention is to exclude such loss by explosion as would be within the policy but for the exception; that is to say, loss or damage by explosion caused by or causing a fire. The memorandum
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makes this clearer by providing that where fire follows an explosion the insurers are not to be liable unless the assured proves that the fire was not caused by the explosion, and by leaving unqualified the exception of loss by explosion caused by a fire.

[267] Moreover the explosion, and not the fire, was the real cause of the loss. In *Livie v. Janson* (1810) 12 East, 648, 104 Eng. Reprint, 253, 11 Revised Rep. 513, a ship was insured against perils of the sea warranted free from American condemnation. She met with a sea peril which enabled the American government to capture and subsequently condemn her; and it was held that the underwriters were not liable. So, in *Cory v. Burr*, *supra*, the ship was insured against barratry warranted free from capture and seizure. She was seized by the Spanish government for an act of barratry by the master; but it was again held that the underwriters were not liable. In *Lawrence v. Accidental Insurance Co.* *supra*, the policy insured against accidents but did not insure "in case of death arising from fits." The assured, being seized with a fit, fell from a railway platform and was killed by an engine. It was held that the insurers were liable. *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* [1918] A. C. 350, 87 L. J. K. B. N. S. 395, 118 L. T. N. S. 120, 34 Times L. R. 221, 62 Sol. Jo. 307, 23 Com. Cas. 190, 14 Asp. Mar. L. Cas. 258, does not help the appellants. There the injury from the war risk continued active and operative until the total loss of the ship. No new cause intervened in that case, as it did in this, to nullify the effect of the first injury. The same is true of *Etherington's Case* [1909] 1 K. B. 591, 6 B. R. C. 517, 78 L. J. K. B. N. S. 684, 100 L. T. N. S. 568, 25 Times L. R. 287, 53 Sol. Jo. 266, pneumonia being one of the well-recognized ways by which an accident and consequent exposure to the weather lead to a fatal end. Of the American cases only one, *Washburn v. Farmers' Insurance Co.* (1880) 2 Fed. 304, purports to be a decision, and that was merely a direction to a jury at nisi prius. The others contain *dicta* but no decision. *Stanley v. Western Insurance Co.* L. R. 3 Exch. 71, 37 L. J. Exch. N. S. 73, 17 L. T. N. S. 513, 16 Week. Rep. 369, is consonant with English authorities; it has stood unquestioned for fifty years, and ought to be followed.

They were stopped.

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Banks, L.J.: The appellants were during the war manufacturing explosives at Ryecroft, Ashton-under-Lyne. With the intention of insuring themselves against loss or damage by fire they entered into contracts with various insurance [268] companies including the Royal Insurance Company. Each company had its own form of policy and conditions, but on the particular point before us there was no material difference in the language of these instruments. Early in the second year of the insurance the amount of the premium was altered, and a memorandum was indorsed on the policies in the same terms in each case relating to the liability of the companies in case of an explosion occurring at the appellants' works. The memorandum was intended to be supplementary to the conditions in the policies which already dealt with the case of explosion. During that year a very disastrous fire broke out, followed by an explosion which had the effect of putting out the fire but in itself did immense damage to the assured property. The companies admit liability for the damage done by the fire before the explosion, but they contend that by the terms of their policies they are exempt from liability for damage resulting from the explosion, and the question is whether the companies' contention is well founded.

The argument for the appellants is that the contract between the parties is a contract of insurance, a contract of indemnity against loss by fire; and that for ascertaining whether a particular loss has been caused by a risk insured against, the general rule is that the proximate, effective, or efficient cause, or, as it was called in *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* [1918] A. C. 350, 87 L. J. K. B. N. S. 395, 118 L. T. N. S. 120, 34 Times L. R. 221, 62 Sol. Jo. 307, 23 Com. Cas. 190, 14 Asp. Mar. L. Cas. 258, the dominant cause, is to be sought for; and that the fire which brought about the explosion was plainly the proximate, effective, or dominant cause of the loss in this case. On the other side this general rule is not disputed, but another general principle is invoked; namely, that the parties may exclude the operation of a general rule in any particular case, and that in this particular case the general rule has been excluded in express and unambiguous language. The point to be decided is whether this contention of the insurance companies is or is not correct. In
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considering this question it must be borne in mind that these contracts of insurance were entered into by parties contemplating damage to property by fire, and that the introduction of any [269] reference to explosion shows that they contemplated an explosion following on or causing a fire. An explosion without any antecedent or consequent fire does not seem to have been in the contemplation of the parties at all. The policy as originally drawn excluded loss or damage from explosion in these terms: "This policy does not cover . . . loss or damage by explosion, except loss or damage caused by explosion of illuminating gas. . . ." The exception of one particular kind of explosion from the general exclusion of explosions shows that the parties intended to exclude from the risks covered by the policy all kinds of explosion other than the one expressly excepted. This general exclusion of explosions, although altered, is not canceled by the memorandum indorsed on each of the policies, which provides that "this policy does not cover loss or damage by explosion nor loss or damage by fire following any explosion unless it be proved that such a fire was not caused directly or indirectly thereby. . . ." That memorandum shows even more plainly that the parties were contemplating and intending to exclude all classes of explosion as sources of loss or damage, and even fire following an explosion, unless the fire is proved not to have been caused directly or indirectly by an explosion. If the question had to be decided for the first time on the terms of the original policy, including condition 3, but without the aid of the memorandum, I should have been prepared to hold that the insurance companies were right in contending that a loss following on an explosion is not covered by the policies. But the matter is not free from authority. *Stanley v. Western Insurance Co.* (1868) L. R. 3 Exch. 71, 74, 75, has been referred to. That case was considered by the arbitrator and the learned judge as a direct authority binding upon them. Mr. Hogg has asked this court to say that case was wrongly decided, and he referred to a number of cases which seem to show that in America his view has been accepted. It is a salutary rule that the courts should be chary in interfering with the interpretation given to a well-known document and acted on for any considerable period of time. The decision in *Stanley v. Western* [270] *Insurance Co.* 10 B. R. C.

has been unchallenged and presumably acted on for fifty years, and even if I did not agree with the view there expressed I should hesitate before overruling it. I need not criticize it, however, because I agree with what was said by Kelly, C. B., and Martin, B. The policy in that case contained a clause not materially differing from condition 8 in the present case. The assured argued that by virtue of that clause the company were not to be liable for any loss arising from explosion, provided the explosion was not occasioned by a fire already in existence upon the premises; but that if there were already a fire upon the premises, so that the explosion was incidental to and occasioned by the fire and then increased the loss by lending itself to further the fire, the whole damage caused was within the insurance of the policy. Dealing with that argument, the Lord Chief Baron said: "To give the instrument this construction would be, in fact, to introduce into it words not found there; while the natural construction of the words gives a probable and easily intelligible sense. In consequence of the widespread and highly mischievous effects of explosions the policy excludes liability for any of their consequences. If there be a fire, in the course of which an explosion occurs, for the result of the fire, unconnected with the explosion, the defendants make themselves liable, but not for any of the consequences of that explosion." Referring to the words, "neither will the company be responsible for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas." Martin, B., said: "They are to be construed according to their natural meaning, and as ordinarily understood by mankind. There is nothing to qualify the word 'explosion,' and I apprehend, therefore, that the company bargain, and the insured agrees with them, that they are not to be responsible for any loss or damage by explosion." The judgment of the Lord Chief Baron has been criticized because, in a passage later than that which I have read, he refers to damage resulting from efforts to put out the fire, for example, by water, or efforts to save furniture by throwing it out of [271] the window, or to check the progress of the fire even by "the destroying of a neighboring house by an explosion," as being within the policy. Mr. Hogg contended that the Chief Baron could not consistently with that view hold that an explosion caused by the fire itself was

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not within the policy. In my opinion the criticism is not sound; but it is not necessary to consider whether all the examples of damage given by the Chief Baron would be within the policy. I agree with his view as to the general exclusion of explosion. The decision in *Stanley v. Western Insurance Co.* (1868) L. R. 3 Exch. 71, 37 L. J. Exch. N. S. 73, 17 L. T. N. S. 513, 16 Week. Rep. 369, was right, and ought to be followed, and this appeal must be dismissed.

Scrutton, L.J.: I am of the same opinion. A fire broke out on the appellants' premises where they were manufacturing tri-nitro-toluol. The fire by its heat caused such an explosion of the tri-nitro-toluol as to blow out the fire and extinguish the factory. The question is whether the terms of a particular policy entitle the appellants to recover the damage done by the explosion. The policy is not in its original form. During the first year of its currency, in circumstances which we are not told, but which we can easily surmise remembering the number of munition factories that sprang up during the war, a special memorandum was indorsed on the policy. The policy in its original form insured the appellants from loss or damage "if the property shall be destroyed by fire." There is no express English decision whether by force of those words damage not directly caused by fire, but necessarily consequent on the fire, is recoverable; for example, damage from an explosion caused by a fire, or damage done by roofs and heavy beams or girders which fall in consequence of the fire, where damage is done by the fall, and not by the fire itself, though the fall is caused by the fire or by efforts made to extinguish it. For though in the last edition of Bunyon's Law of Fire Insurance, 6th ed. (1913), pp. 155, 156, a passage is cited purporting to be the opinion of Kelly, C.B., that increased damage caused by the ignition of explosive substances must be made good, the passage is really part [272] of the argument for the plaintiff, who failed. It is not necessary to decide the point, though I incline to the view that the damage mentioned above would be within this policy if there were no exceptions. To see what damage, *prima facie* covered by the policy, is excepted from the insurance, a printed condition relating to explosions and an
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added memorandum have to be considered. Fifty years ago it was submitted, as a possible construction of a similar clause excepting loss or damage arising from explosion, that it only shut out explosions where there was no antecedent fire. That was Mr. Quain's argument in *Stanley v. Western Insurance Co.* (1868) L. R. 3 Exch. 71, 37 L. J. Exch. N. S. 73, 17 L. T. N. S. 513, 16 Week. Rep. 369. The Court of Exchequer decided against it. The result is that for fifty years there has been authority in England for construing condition 3 of this policy as excluding loss or damage from an explosion although it is the consequence of an antecedent fire. I feel bound to read the words of the condition in the light of existing English decisions. It would take a very strong case to induce me to give to the words a meaning different from that given to them by an English decision unquestioned for fifty years. I am not impressed by the fact that a different view has been taken by American courts on American policies. Those courts frequently differ from ours on the construction of mercantile documents. English courts construe documents by the light of English decisions. In my view the loss or damage in this case was excluded by the effect of condition 3.

But the case does not stop at the printed conditions. The effect of the memorandum has still to be considered. I agree that the memorandum contemplates four cases of fire with or without an explosion: First, fire without explosion. Clearly the memorandum has nothing to do with that. Secondly, explosion without fire. It seems clear that this (unless it were a gas explosion) would not be within the policy. Thirdly, explosion followed by fire; as to that the memorandum says that the policy does not cover loss caused by the fire unless it be proved that the fire was not caused directly or indirectly by the explosion, or was not the result [273] thereof. The effect of this is that, where damage is done by an explosion and fire following it, the assured cannot recover unless he can prove that the fire was not caused by the explosion. This case is specifically dealt with by the last part of the memorandum. Fourthly, fire followed by explosion. This case is not within the latter part of the memorandum. It is dealt with separately in the earlier part of these words, "This policy does not cover loss or damage by explosion." I do not

think those words were inserted to except loss from explosion where there was no fire, which *prima facie* would not be within the policy at all and would need no exception. In my view the intention was to except loss from an explosion following and caused by a fire, and to repeat the decision in *Stanley v. Western Insurance Co. supra*. I appreciate the point that a policy against fire in a factory for high explosives is not of much use if it does not cover loss or damage by explosion. That, however, is a matter between the assured and their insurers. It ought not of itself to outweigh the other considerations I have mentioned. I agree that the appeal should be dismissed.

Duke, L.J.: I agree. The immediate cause of the damage in this case was an explosion through which the premises themselves and the fire which had broken out in them ceased to exist at the same time. The assured claim to recover because, as they say, the effective cause of the damage was the fire. It is not necessary to say what the result would have been if the case had rested on the words on the face of the policy, or on those words together with the condition 3. The original position of the parties was modified by a memorandum the terms of which we have to consider. The memorandum provided that the policy should not cover loss or damage by explosion, nor loss or damage by fire following an explosion, unless it were proved that, to put it shortly, the fire was independent of the explosion. What is the effect of excluding one of several kinds of damage which insurers might otherwise be bound to make good? I take it to be [274] elementary that an exception such as this is an exception of something which would be in the policy if it had not been excepted. The intention, then, is to exclude loss by explosion which, but for the exclusion, would or might have involved the insurers in liability. Now, there are two classes of explosion which occur to the mind at once: (1) Those mentioned in condition 3, that is to say, explosions which occur in the course of a fire, and (2) explosions which cause a fire. The exception deals with something more than explosions which cause a fire. It deals in its first words with loss or damage caused by explosion in the most general terms, and that must be such loss or damage caused,

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by explosion, as, but for the exception, would have been within the effective words of the policy. It must, therefore, be loss or damage caused by an explosion occurring in connection with fire. An explosion independent of fire would not be within the policy at all. The two classes of explosion are separately dealt with. In the present case there was an explosion in the course of a fire, and it seems to me that the parties have agreed in express and comprehensive terms that damage caused by such an explosion shall not be within the terms of the policy. In this investigation I am glad to have the guidance of *Stanley v. Western Insurance Co.* (1868) L. R. 3 Exch. 71, 37 L. J. Exch. N. S. 73, 17 L. T. N. S. 513, 16 Week. Rep. 369. The arguments which prevail with me are those which prevailed with the Court of Exchequer in that case. In my view it was rightly decided. The arguments which influenced the court must lead us to the same conclusion. I cannot adopt the suggestion that there is in this policy any ambiguous language to be construed *contra proferentes*.

With regard to the American cases, great respect is due to the opinion of every judge who applies his mind to a system of law analogous to our own and in many cases identical with it. But on some questions of mercantile law English and American decisions have diverged. We cannot say and it is unnecessary to inquire how this question may be treated by the Supreme Court of the United States. We have a clear decision in accordance with principles of construction [275] and administration of English law, which leads me to the conclusion that the learned judge was right and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Vizard, Oldham, & Company*, for *Hockin, Becton & Hockin, Manchester*.

Solicitors for respondents: *Alfred Bright & Sons*, for *Bate-sons, Warr, & Wimshurst, Liverpool*; *Paines, Blyth, & Huxtable*, for *Wightman, Pedder, & Company, Liverpool*.

Note.—Insurance: liability of insurer against fire for damage caused by explosion occasioned by fire.

It is a well-settled rule in the United States that an insurer, under 10 B. R. C.

a policy insuring against loss by fire, is liable for damage caused to the insured property by an explosion, where there was a fire on the premises and it was followed by an explosion which was an incident of the fire, or caused thereby, it being considered under such circumstances that the entire loss is a loss caused by fire; and this rule of liability is applied to insurers whose contracts except losses from explosions of any kind, as well as those whose policies do not.

UNITED STATES.—*Waters v. Merchants' Louisville Ins. Co.* (1857) 11 Pet. 213, 9 L. ed. 691; *Mitchell v. Potomac Ins. Co.* (1901) 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. Rep. 22; *Washburn v. Farmers' Ins. Co.* (1880) 2 Fed. 304; *Washburn v. Miami Valley Ins. Co.* (1880) 2 Flipp. 664, 2 Fed. 633; *Washburn v. Artisans' Ins. Co.* (1879) Fed. Cas. No. 17,212; *Washburn v. Union F. Ins. Co.* (1879) Fed. Cas. No. 17,215; *Washburn v. Western Ins. Co.* (1879) Fed. Cas. No. 17,216.

CALIFORNIA.—*Rossini v. St. Paul F. & M. Ins. Co.* (1920) — Cal. —, 188 Pac. 564; *Rossini v. Security Mut. F. Ins. Co.* (1920) — Cal. App. —, 189 Pac. 810.

COLORADO.—*Western Ins. Co. v. Skass* (1918) 64 Colo. 342, 171 Pac. 358.

FLORIDA.—*Fire Asso. of Phila. v. Evansville Brewing Asso.* (1917) 73 Fla. 904, 75 So. 196.

INDIANA.—*German Baptist Tri-County Mut. Protective Asso. v. Conner* (1917) 64 Ind. App. 293, 115 N. E. 804.

KENTUCKY.—*New Hampshire F. Ins. Co. v. Rupard* (1920) 187 Ky. 671, 220 S. W. 538.

LOUISIANA.—*Caballero v. Home Mut. Ins. Co.* (1860) 15 La. Ann. 217.

MARYLAND.—*Transatlantic F. Ins. Co. v. Dorsey* (1880) 56 Md. 70, 40 Am. Rep. 403.

MISSOURI.—*Renshaw v. Firemen's Ins. Co.* (1888) 33 Mo. App. 394; *Renshaw v. Missouri State Mut. F. & M. Ins. Co.* (1890) 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 945; *Cohn v. National Ins. Co.* (1902) 96 Mo. App. 315, 70 S. W. 259; *La Force v. Williams City F. Ins. Co.* (1890) 43 Mo. App. 518.

NEW YORK.—*Briggs v. North American & M. Ins. Co.* (1873) 53 N. Y. 446, dicta; *Wheeler v. Phenix Ins. Co.* (1911) 203 N. Y. 283, 38 L.R.A. (N.S.) 474, 96 N. E. 452, Ann. Cas. 1913A, 1297; *Bird v. St. Paul F. & M. Ins. Co.* (1918) 224 N. Y. 47, — A.L.R. —, 120 N. E. 86.

TENNESSEE.—*Hall v. National F. Ins. Co.* (1905) 115 Tenn. 513, 112 Am. St. Rep. 870, 92 S. W. 402, 5 Ann. Cas. 777.

TEXAS.—*Northwestern Nat. Ins. Co. v. Mims* (1920) — Tex. Civ. App. —, 226 S. W. 738; *Northwestern Nat. Ins. Co. v. Westmoreland* (1921) — Tex. Civ. App. —, 227 S. W. 239; *Liverpool & 10 B. R. C.*

L. & G. Ins. Co. v. Currie (1921) — Tex. Civ. App. —, 234 S. W. 232.

The court in *Hall v. National F. Ins. Co. supra*, said: "The weight of authority is to the effect that where the fire occurs in the property insured, and an explosion takes place therein during the progress of the fire, the effects of which are covered by the policy, and such explosion is a mere incident of the preceding fire, the latter is treated as the efficient cause, and the whole loss is within the risk insured, although the policy in terms excludes liability for loss by explosion. . . . In *May on Insurance*, it is said: 'Where the policy excluded liability "for loss by lightning or explosion of any kind unless fire ensues, and then for damages by fire only," it was held in a case where it appeared that vapor evolved from material in process of manufacture, coming in contact with a burning lamp, exploded, tearing off the roof, shattering the walls, and damaging the machinery, upon which a fire supervened, that the insurers were liable for the damage done by the fire, but not for that done by the explosion. If, under such a policy, fire precedes the explosion, the entire loss is to be attributed to the fire, though the explosion is destructive.' *Id.* vol. 2, 4th ed. p. 956. In a note upon the same page, it is said: 'If a fire occurs by a cause within the policy and an explosion takes place as an incident to the fire so as to increase the loss, the whole damage is within the policy, although it contains an exemption from liability for the explosion.' . . . In *Clements on Insurance*, it is said: 'When explosions or explosive effects occur after the commencement of a fire, or during its progress, and as an incident of a fire or a result of it, the whole loss is a loss by fire within the meaning and protection of the policy, notwithstanding the destructive effect of the explosion; it is ordinarily a question of fact; if the explosion precedes the fire the company is liable for the damage by fire only, and not for that caused by the explosion.' *Id.* p. 123. In *Elliott on Insurance*, it is said: 'The standard form provides for liability for damage occasioned by fire which results from an explosion, and exempts the insurer from liability for damages caused by the explosion itself. The loss by explosion must be distinguished from that caused by the subsequent fire. Under this provision the insurer is liable for the loss when the explosion is the result of an antecedent fire.' *Id.* p. 212. In *Joyce on Insurance*, it is said: 'Insurers are liable upon a policy which contains a condition of this nature' (i. e., excepting liability for damages by explosions of any kind); 'where fire originates in the insured premises and the fire produces an explosion which destroys the property, the entire loss in such a case is held to be a loss by fire.' *Id.* vol. 3, p. 2532, ¶ 2593. Again, this author says: 'If the combustion and explosion are inseparably connected, if a combustible substance in the process of combustion pro-

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duces explosion also, and fire is the agent throughout, and there is a loss by both fire and explosion, it is held that the whole damage is covered by a policy insuring against loss by fire. *Id.* p. 2707, ¶ 2771."

And in *Wheeler v. Phenix Ins. Co.* (1911) 203 N. Y. 283, 38 L.R.A.(N.S.) 474, 96 N. E. 452, Ann. Cas. 1913A, 1297, where the policy insured against loss by fire, except loss caused directly or indirectly by explosion of any kind unless fire ensued, and in that event for the damage by fire only, the court in holding that the insurer was not relieved from liability for loss from an explosion caused by fire said: "The provision, therefore, embraced in the exception 'unless fire ensues,' should be read as meaning 'unless fire follows or comes after or as a consequence of the explosion.' This being the meaning of the provision, it is apparent that a fire which precedes and causes the explosion is not embraced in the exception contained in the policy from the provision which insures against all direct loss or damage by fire. Nor do we think that the words 'by explosion of any kind' were intended to refer to the agency which produced the explosion, but have reference to the different kinds of material that explode, such as powder, dynamite, gas, dust, etc. Had the legislature, in adopting the standard form of policy, intended to have included explosions caused by fire with explosions from which fire ensues among the losses excepted from the provisions of the policy, it doubtless would have done so in express terms. That such was not its intention we think is clearly evident from the fact that they were careful to limit the exception of those explosions from which a fire ensues. This form of fire insurance policy and the construction which we have given to it is not new. It has frequently been considered by the courts and text-writers upon the subject, who have quite uniformly reached the conclusion that when a negligent or hostile fire exists within the insured premises, and an explosion results therefrom under such circumstances as to constitute the fire the proximate cause of the loss and the explosion merely incidental, the company becomes liable upon its policy for the loss resulting therefrom."

In *Rossini v. Security Mut. F. Ins. Co.* (1920) — Cal. App. —, 189 Pac. 810, a finding that an explosion on the insured premises did not precede a fire, but that it occurred during a fire, and while the insured building was being destroyed thereby, was held supported by the evidence, the only witness testifying on the question having stated that he saw that the building was on fire, and shortly afterward heard the explosion.

And in *Renshaw v. Missouri State Mut. F. & M. Ins. Co.* (1890) 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 945, where there was evidence, in an action on a fire policy containing no exception as to explosions, that just before an explosion in the insured building there
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was a glowing blaze in the building, and that a moment before the explosion someone called "fire," and that timbers from the building were on fire when they fell immediately after the explosion,—there was held sufficient evidence to authorize the submission to the jury of the question whether a fire preceded the explosion, and to justify a finding that there was such a fire.

In *Hobbs v. Guardian Assur. Co.* (1886) 12 Can. S. C. 631, where a match was dropped into gunpowder, which was a part of the stock insured, and damage resulted from an explosion and fire, it was held that the insurer, having issued a policy insuring against fire, and including gunpowder, was not exempted from liability for the loss from explosion by a provision that the company would not make good a loss caused by the explosion of coal gas in a building, or loss by fire caused by any other explosion, or by lightning.

It will be noted that in the reported case (*RE HOOLEY HILL RUBBER & CHEMICAL Co. ante*, 194), where loss resulted from an explosion in the insured's factory of tri-nitro-toluol, which exploded from heat generated by a fire on the premises which had burned some time before the explosion, the insurers were held not liable for such loss, under fire policies providing that they should not cover loss occasioned by explosion, except loss caused by explosion of illuminating gas, and containing typewritten memoranda that the policies did not cover loss or damage by explosion, or by fire following any explosion, unless it was proved that such a fire was not caused, directly or indirectly, thereby, or was not the result thereof. This conclusion, it will be observed, is contrary to the American authorities.

The court in the reported case relied on the decision in *Stanley v. Western Assur. Co.* (1868) L. R. 3 Exch. 71, where the fire policy involved provided, "neither will the company be responsible for loss or damage by explosion;" and it appeared that, owing to a leak in an extractor, vapor escaped, caught fire from lamps, ignited some matting and bags, and became mixed with air and exploded; and it was held that the exemption covered a case where an explosion occurred in the course of a fire as well as where a fire originated from an explosion. Kelly, C. B., said: "I agree that any loss resulting from an apparently necessary and bona fide effort to put out a fire, whether it be by spoiling the goods by water, or throwing the articles of furniture out of window, or even the destroying of a neighboring house by an explosion for the purpose of checking the progress of the flames,—in a word, every loss that clearly and proximately results, whether directly or indirectly, from the fire,—is within the policy. But that an explosion under those particular circumstances would not be within the exception affords no ground for excluding from it this explosion, which arises in a totally different mode, and to exclude which would almost amount to expunging the clause altogether from the policy."

And in *Curtis's & Harvey (Canada) v. North British & M. Ins. Co.* 10 B. R. C.

[1921] 1 A. C. 303, 37 Times L. R. 40, where a policy was issued to a manufacturer of explosives against loss by fire, containing a warranty, proposed by the insured, against claims for loss or damage caused by explosion of any material used on the premises, and a statute provided that insurers should indemnify against losses caused by the explosion of gas and other losses caused by any explosion causing fire, which statute was varied by an addition to the policy providing that the insurer should not be liable for loss caused by explosions of any kind, unless fire ensued, and then for the loss or damage caused by fire only, it was held that as the words of the warranty were general and in no way limited, they applied to the whole risk in which explosions took a part, and were not confined to the statutory condition; and, it appearing that insured premises had been destroyed by a fire and by explosions which occurred during the course of the fire, it was held that since the warranty excluded liability for all loss by explosions, the respective amounts of loss by fire and by explosion must be ascertained.

It may be stated that probably under the American authorities the insurer, on the facts involved in the *Stanley Case*, *supra*, would not have been held liable, since the flame of a lamp is not considered a fire by the American courts.

Thus it is held that in order that an insurer be liable for a loss by an explosion preceded by a fire, the fire causing the explosion must be such as would naturally have resulted at least in the partial destruction of the property, and a lighted match, cigar, lamp, gas jet, and similar flames, from which an explosion results, are insufficient to charge the insurer.

UNITED STATES.—*Mitchell v. Potomac Ins. Co.* (1901) 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. Rep. 22, affirming (1900) 16 App. D. C. 241; *Washburn v. Western Ins. Co.* (1879) Fed. Cas. No. 17,216.
 ARKANSAS.—*Phoenix Ins. Co. v. Greer* (1896) 61 Ark. 509, 33 S. W. 840.

COLORADO.—*German American Ins. Co. v. Hyman* (1907) 42 Colo. 156, 16 L.R.A.(N.S.) 77, 94 Pac. 27.

ILLINOIS.—*Heuer v. North Western Nat. Ins. Co.* (1893) 144 Ill. 393, 19 L.R.A. 594, 33 N. E. 411.

MISSOURI.—*Stephens v. Fire Asso. of Phila.* (1909) 139 Mo. App. 369, 123 S. W. 63.

NEW YORK.—*Briggs v. North American & M. Ins. Co.* (1873) 53 N. Y. 446.

NEW JERSEY.—*Ross v. Liverpool & L. & G. Ins. Co.* (1912) 83 N. J. L. 340, 84 Atl. 1050.

OHIO.—*United Life F. & M. Ins. Co. v. Foote* (1872) 22 Ohio St. 340, 10 Am. Rep. 735.

SOUTH DAKOTA.—*Home Lodge Asso. v. Queen Ins. Co.* (1907) 21 S. D. 165, 110 N. W. 778.

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TENNESSEE.—*Hall v. National F. Ins. Co.* (1905) 115 Tenn. 513, 112 Am. St. Rep. 870, 92 S. W. 402, 5 Ann. Cas. 777.

In *German Baptist Tri-County Mut. Protective Asso. v. Conner* (1917) 64 Ind. App. 293, 115 N. E. 804, a loss by the explosion of an acetylene lighting plant, caused by gas escaping and coming in contact with fire in a stove located in the cellar with the lighting plant, was held to be covered by a policy in a mutual association whose object, as stated in its rules, was to do unto others as we would have others do unto us, and to pay losses sustained by burning of insured property.

It is generally held, where a policy insures against loss by fire, and provides against liability for loss caused directly or indirectly by an explosion of any kind, that the insurer is not liable for loss occasioned merely by the concussion of an explosion which occurs in another building, although the explosion was caused by the existence of fire.

ILLINOIS.—*Miller v. London & L. F. Ins. Co.* (1891) 41 Ill. App. 395.

KENTUCKY.—*Phoenix Ins. Co. v. Adams* (1910) — Ky. —, 127 S. W. 1008.

LOUISIANA.—*Caballero v. Home Mut. Ins. Co.* (1860) 15 La. Ann. 217.

NEW YORK.—*Hustace v. Phenix Ins. Co.* (1903) 175 N. Y. 292, 62 L.R.A. 651, 67 N. E. 592; *Eppens, S. & W. Co. v. Hartford F. Ins. Co.* (1904) 99 App. Div. 221, 90 N. Y. Supp. 1035.

OHIO.—*Germania F. Ins. Co. v. Roost* (1897) 55 Ohio St. 581, 36 L.R.A. 236, 60 Am. St. Rep. 711, 45 N. E. 1097.

TENNESSEE.—*Hall v. National F. Ins. Co.* (1905) 115 Tenn. 513, 112 Am. St. Rep. 870, 92 S. W. 402, 5 Ann. Cas. 777.

TEXAS.—*Northwestern Nat. Ins. Co. v. Mims* (1920) — Tex. Civ. App. —, 26 S. W. 738; *Liverpool & L. & G. Ins. Co. v. Currie* (1921) — Tex. Civ. App. —, 234 S. W. 232.

And in *Bird v. St. Paul F. & M. Ins. Co.* (1918) 224 N. Y. 47, — A.L.R. —, 120 N. E. 86, a policy insuring a canal boat against loss by fire, and containing no express exception of damage from explosion, was held not to cover damage to the boat where it appeared that from an unknown cause fire broke out under cars loaded with explosives; that an explosion occurred which started another fire, which fire caused an explosion of a larger amount of explosives, as a result of which the boat, which was 1,000 feet distant, was injured by the concussion of air; the court holding that the fire was not, under the facts, the proximate cause of the damage, and stating that to warrant a recovery fire must reach the thing insured, or come within such proximity thereto that damage, direct or indirect, is within the compass of reasonable possibility.

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[SUPREME COURT OF NOVA SCOTIA.]

VARNER *v.* MORTON.

53 N. S. 180.

Charivari — Reflection upon plaintiff's character — Actionability.

To make a married woman while in company with a man not her husband the object of a mock serenade by ringing bells, firing of guns, and shouting, according to a custom prevailing in the locality in the case of newly married people, with the object of reflecting upon such woman's moral character by imputing to her improper relations with her companion, is actionable without proof of special damage.

Chisholm, J., dissenting.

(May 2, 1919.)

Before Harris, Ch. J., Russell, J., Ritchie, E. J., and Chisholm and Melish, JJ.

APPEAL by defendants from the decision of J. A. Grierson, Esq., judge of the county court for district No. 3, refusing to set aside certain findings of the jury in an action by plaintiff claiming damages for unlawful acts of defendants, committed with the intent and purpose of bringing plaintiff into disrepute and injuring her in her character as a chaste married woman. The facts appear fully from the judgments.

W. H. Covert, K.C., for respondent, took preliminary objections. The notice of appeal is bad. Nothing more can be asked for here than the county court judge was asked for, *i. e.*, for a new trial. The court is asked to dismiss the action, with costs. The order for judgment should have been appealed from. There is no appeal to this court from a discretionary decision of the county court.

[181] *Encyc. Pleading and Practice*, v. 14, pp. 930, 955; *Snyder v. Arenburg* (1894) 27 N. S. 250.

Jas. A. Maclean, K.C., for defendants, appellants. There is no such action as that brought. The acts of the defendants did not amount to defamation. There is no evidence to support the claim of damage to plaintiff's reputation. Justification is pleaded. Defendants claim that plaintiff had no character to

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lose. There must be proof of special damage. 1 Halsbury, 9-12; 1 Cyc. 660, 661. No such proof has been offered.

W. H. Covert, K.C., O. S. Miller, K. C., and E. M. McNutt, *contra*. We can succeed without proof of special damage. Defendants' actions were equivalent to words imputing unchastity. Starkie on Libel, pp. 179, 180; *Jefferies v. Duncombe* (1809) 11 East, 226, 103 Eng. Reprint, 991, 2 Campb. 3. Slight evidence of special damage is sufficient. Plaintiff was treated differently in the community, was given the "cold shoulder," and her reputation after this was bad. If we are right as to the claim, there is ample evidence to support the verdict. (1877) 17 N. B. 289; *Sheraton v. Whelpley* (1880) 20 N. B. 75; Odgers on Libel and Slander, p. 13.

Harris, Ch.J.: The plaintiff is the wife of a soldier who was overseas, and she had been frequently seen by her neighbors driving about the country with a married man named McNayr, who was also a frequent visitor at the house of the plaintiff's mother, with whom the plaintiff was living. On the 23d of October last the plaintiff drove from Springfield to New Germany with McNayr, and when they returned the defendants met them near the village, fired off guns, rang bells, and shouted, and the plaintiff alleges in her statement of claim that defendants unlawfully and maliciously conspired to do these acts, and did them, for the purpose of bringing her into disrepute and injuring her reputation for chastity, and to suggest that immoral [182] relations existed between her and McNayr, and for this she claimed damages. There is also a claim that McNayr's horse was frightened by the noises, and plaintiff was injured in getting out of the wagon owing to the restlessness of the horse. This latter claim was rejected by the jury, who, however, awarded plaintiff \$200 for damage to her reputation. The case was tried by the county court judge for district No. 3, and a motion to set aside the findings was rejected by him, and there is an appeal from his decision.

The defendants alleged, among other things, that immoral and improper relations existed between plaintiff and McNayr, and also set up that she had been guilty of "vile and unchaste conduct." 10 B. R. C.

duct both in regard to McNayr and with regard to others, and, in that regard, her character and reputation has not suffered in the community in which she lives."

A perusal of the evidence disclosed that she had acted most imprudently, but there is no proof of any immoral conduct on her part with McNayr, and the suggestion was repudiated by them both. There was evidence of one witness that plaintiff had admitted to her that she had committed adultery with a certain man, but the plaintiff denied making the statement and also the offense, and the matter was for the jury, who evidently believed the plaintiff.

There is no doubt from the evidence that the defendants' action on the occasion in question was intended to suggest that plaintiff and McNayr were misconducting themselves, and after the charivari was over they or some of them plainly intimated to McNayr that they thought his place was at home with his own wife, instead of going about with the plaintiff.

There was no proof of special damage, and the question raised on the appeal is whether the conduct of the defendants is actionable without such proof.

There was much discussion as to whether what was [183] done came within the designation of slander or libel; and, if neither slander nor libel, whether an action on the case for conspiracy would lie.

The question as to whether the acts of the defendants are to be regarded as slander or libel becomes important because of the rule of the common law that it is not actionable to impute by words spoken unchastity to a woman without alleging and proving special damage, whereas if the words were written or came within the definition of libel they were actionable without such proof.

Our order xix., rule 29, was intended to do away with this distinction, and provided that:

"29. In any action for slanderous words spoken of any woman, imputing to her any unchaste conduct, it shall not be necessary to allege in pleading, or prove at the trial, that any special damage resulted to her from the utterance of such words;
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but she shall recover such damages as may be assessed, without such averment or proof of damage.

If the acts of the defendants are held to amount only to slander there would still have to be considered the question whether order xix., rule 29, applied to the facts in evidence here, or whether it would be necessary, notwithstanding that rule, to allege and prove special damage.

I must confess that on the argument I was inclined to the view that the acts of the defendants were equivalent to saying or speaking of the plaintiff that she was unchaste. I thought it might very well be said that the defendants had made the guns speak, and what they plainly said of the plaintiff was that she was unchaste; but after giving the matter careful consideration I have reached the conclusion, though not without much doubt, that the acts in question are of that intermediate character between slander and libel to which the rules applicable to libel apply.

Starkie on Slander and Libel, after dealing with the [184] ordinary cases of slander and libel, and with libel by pictures and caricatures, says at page 169: "There remains a class of communications differing from those last adverted to, and which, though accompanied with circumstances of cooler deliberation and more settled purpose than words merely spoken, are not calculated to produce such lasting and widely extended consequences as those effected by writings or pictures. The vulgar custom of riding Skimmington, and the practice of carrying or burning effigies of persons intended to be held out as public objects of disgrace and ridicule, are instances of this description. The impressions made by such proceedings are naturally more lasting, and are likely to produce a greater degree of mischief than words merely spoken; yet the calumny is not so durable as if it had been conveyed in print or in writing. As, however, these are means by which a man may be rendered, in many instances, contemptible and ridiculous, and in others may be exposed to the serious effects of popular indignation and resentment, as the act of the defendant is more studied and deliberate, and the consequences more mischievous than those likely to be occasioned by mere oral slander,—it seems to be clear that such

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representations are actionable as falling within the same consideration with the other cases which have formed the subject of the present chapter."

In the case of *Sir William Bolton v. Deane*, referred to in the judgment of the court in *Austin v. Culpepper* (1683) 2 Show, 313, 89 Eng. Reprint, 960, an action was maintained for scandalizing the plaintiff by carrying a fellow about with horns, bowing at the plaintiff's door.

And in the case of *Jefferies v. Duncombe* (1809) 11 East. 226, 103 Eng. Reprint, 991, 2 Campb. 3, an action was maintained against the defendant for setting up a lamp adjoining the dwelling house of the plaintiff and keeping it burning in the daytime with intent to defame the plaintiff as the keeper of a brothel.

The courts have also held that signs or pictures, as by fixing up a gallows against a man's door or painting him in a shameful or ignominious manner, may constitute a libel.

[185] After citing a number of cases, Starkie proceeds at page 190:

"Upon the whole, therefore, it may be collected that any writings, pictures, or signs which derogate from the character of an individual, by imputing to him either bad actions or vicious principles, or which diminish his respectability and abridge his comforts, by exposing him to disgrace and ridicule, are actionable without proof of special damage. In short, that an action lies for any false, malicious, and personal imputation, effected by such means, and tending to alter the party's situation in society for the worse.

"This rule, though apparently very wide and comprehensive, is not considered to be more extensive than the justice of the case demands. No man abstractedly has a right to lessen the comforts or enjoyments of another; and when he does it deliberately, wantonly, and maliciously, it would be an insult to common sense to contend that he is not bound, upon the plainest grounds of policy and justice, to make compensation for the mischief so occasioned, and no inconvenience can result from such an extent of the rule."

It is difficult to distinguish in principle between the case of carrying a fellow about dressed with horns and bowing at the
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plaintiff's door, on the one hand, and the firing of guns, the ringing of bells, etc., on the other. In both cases the imputation was conveyed by the conduct or acts of the defendants, and I do not see why there would be a right of action for damages in one case and not in the other; and if one is libel I do not see why the other does not come within the same category.

Slander formerly meant any defamation, whether written or spoken; but the modern meaning has restricted it, at least so far as decided cases go, to spoken words; and the tendency seems to have been to embrace everything defamatory (other than spoken words) by the term "libel;" and a learned judge in the United States has said that "the attempts to define libel, although practically innumerable, have never been so comprehensive and accurate as to comprehend all cases that may arise, and [186] that such attempts in this regard in some degree resemble similar attempted definitions of fraud."

In the case of *Miller v. Donovan* (1896) 16 Misc. 453, 39 N. Y. Supp. 820, the court gave a definition of libel which seems quite comprehensive enough to include the present case. It was:

"Any unprivileged publication of which the necessary tendency is to expose a man to hatred, contempt, or ridicule."

"A malicious publication by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which exposes any living person or the memory of any person deceased, to hatred, contempt, ridicule, or obloquy, or which causes, or tends to cause, any person to be shunned or avoided, or which has a tendency to injure any person, corporation, or association of persons, in his or their business or occupation."

It was argued that an action on the case for conspiracy would lie; but, as I understand the authorities, the gist of such an action is the damage and not the conspiracy; and a conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff.

Huttley v. Simmons [1898] 1 Q. B. 181, 67 L. J. Q. B. N. S. 213, 14 Times L. R. 150; *Savile v. Roberts* (1697) 1 Ld. Raym. 374, 91 Eng. Reprint, 1147; *Kearney v. Lloyd* (1887) Ir. L. R. 26 C. L. 280; *Cotterell v. Jones* (1851) 11 C. B. 714, 10 B. R. C.

at p. 730, 138 Eng. Reprint, 656, 21 L. J. C. P. N. S. 2; 16 Jur. 88; *Municipality of East Missouri v. Horseman* (1858) 16 U. C. Q. B. 562; *Quinn v. Leathem* [1901] A. C. 499, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66.

If the conspiracy had been to libel the plaintiff, no doubt damages could be recovered, because damages are assumed in such a case; but if the conspiracy was to slander by speaking and publishing something which was not actionable without proof of special damage, then the plaintiff in this case would fail in an action for conspiracy, because there is no proof of special damage, unless, of course, our order XIX., rule 29, is comprehensive enough to give a right of action without proof of special [187] damage. I am unable, therefore, to see how it can be said that an action for conspiracy will lie in this case, where there is no proof of actual damage, unless it is first determined that the acts of the defendants amount to libel, or being slander, that order XIX., rule 29, is applicable and obviates the necessity for proof of special damage.

Having, however, reached the conclusion that the acts of defendants are of the nature of libel, it follows, if I am right, that the appeal ought to be dismissed, with costs.

Russell, J., concurred with **Ritchie, E.J.**

Ritchie, E.J.: The plaintiff is a married woman. In October, 1917, she was living at Springfield in the county of Annapolis with her mother. At the time her husband was overseas. In the summer and autumn of 1917 there was no man about the mother's place, her sons being also overseas; and a man by the name of Lambert McNayr helped about the place planting, cutting wood, and performing other neighborly acts, such as it would be natural for a man to do for women whose men were fighting the Germans. The plaintiff drove about with this man, McNayr, a good deal, and it no doubt was the cause for remark among the good people of Springfield. The defendants seem to have regarded it as their special duty to take action in regard to the conduct of the plaintiff and McNayr. They saw evil where,
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so far as the evidence discloses, there was none. The conduct of the plaintiff was, I think, indiscreet, and that is all that can be said against her. The mother, who, I assume, is a respectable woman, saw nothing wrong in the relations of the plaintiff with McNayr, and did not disapprove of her driving with him; and it seems to me that it would have been far better from every point of view if the defendants had minded their own business. On the 23d of October last McNayr drove the plaintiff to New Germany, a distance of 12 miles from Springfield. [188] The object of the trip appears to have been to enable the plaintiff to visit her husband's parents, who reside at New Germany. The plaintiff and McNayr were back in Springfield at about a quarter past 9 in the evening. The defendants, in their zeal, illegally conspired to commit and did commit an illegal act. There is a custom in the country parts of Nova Scotia for a concourse of people to greet newly married people with the blowing of horns, the ringing of bells, the firing off of guns, and any other device which occurs to them as likely to make night hideous. The underlying idea is that the man and woman are married and have come home, hence the celebration. On the return of the plaintiff and McNayr from New Germany, the defendants went through this kind of performance which I have indicated. It is known as a charivari, and is defined by Webster as "a mock serenade of discordant noises, made with kettles, tin horns, etc., designed to annoy and insult; at first performed before the house of any person of advanced age who married a second time."

The conduct of the defendants was absolutely illegal. They assembled together and created a disturbance of the peace of the neighborhood. They committed a breach of the criminal law. It was an unlawful assembly. 1 Russell on Crimes, p. 423; *Gilmore v. Fuller* (1902) 198 Ill. 130, 60 L.R.A. 286, 65 N. E. 84, 13 Am. Neg. Rep. 38.

The plaintiff brings her action under the circumstances I have mentioned. She claims damages under two heads:

1. That the horse was frightened by the noise and that consequently she received bodily injuries in getting out of the carriage.

2. That she has been injured in her character and reputation.

The case was tried in the county court at Bridgetown, with a jury. The questions to, and answers by, the jury, are as follows:

[189] "1. Did the plaintiff suffer any personal injury from the celebration?" "No."

"2. Did the plaintiff suffer any damage to her reputation or character by the acts of the defendants in said celebration?" "Yes."

"3. If you find for the plaintiff on either of above questions, what amount of damage has she sustained?" "Two hundred dollars as to her reputation and character."

The defendants failed in a motion before the county court judge to set aside the 2d and 3d findings of the jury, and from his decision and the order made thereon an appeal is asserted to this court. Of course the Springfield people knew that the plaintiff had a husband, and that McNayr had a wife; and I think this action of the defendants imputed misconduct, using the word in the sense which it has acquired in the Divorce Court. An action in this particular form is unusual, but the reason for that is that the circumstances of the case are unusual. If an injury causing damage has been inflicted on the plaintiff it cannot be that the law does not provide a remedy. The scope of an action on the case is wide enough to cover any illegal acts which have caused damage.

This case is, in my opinion, technically not an action for slander or libel, but an action on the case for conspiracy. In 27 Halsbury's Laws of England, at page 489, it is said: "Conspiracy consists in two or more persons agreeing together to do something contrary to law or wrongful and harmful towards another person, or to use unlawful means in the carrying out of an object not otherwise unlawful. Where two or more persons thus conspire to do an act which causes damage to another, they commit a tort for which they or any of them can be sued."

This definition which I have quoted is, in my opinion, sound and exhaustive. I refer to the following authorities:

[190] Lord Justice Bowen in *Mogul Steamship Company v. McGregor* (1889) L. R. 23 Q. B. Div. at p. 616; *Quinn v. Leatham* [1901] A. C. 510, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times 10 B. R. C.

L. R. 749, 27 Eng. Rul. Cas. 66; *Jones v. Baker* (1827) 7 Cow. 444; *Van Horn v. Van Horn* (1890) 52 N. J. L. 284, 10 L.R.A. 184, 20 Atl. 485; *Kimball v. Harman* (1871) 34 Md. 407, 6 Am. Rep. 340.

In *Quinn v. Leathem*, Lord Lindley said: "But numbers may annoy and coerce where one may not; annoyance and coercion by many may be so intolerable as to become actionable and produce a result which one alone could not produce."

I go back to Halsbury's definition as to conspiracy, and find that the following elements must be present in order that a civil action be successful:

1. Two or more persons must agree to do something contrary to law.
2. Or wrongful and harmful to another person.
3. Or to use unlawful means in the carrying out of an object not otherwise unlawful.
4. An act done in pursuance of the conspiracy which causes damage to another.

All these elements are present in this case.

That there was an agreement between the defendants to meet together and make the demonstration which it is clear was made is shown by the evidence, but apart from evidence such an agreement is to be inferred from the fact that they were all present with the guns, horns, bells, and other instruments of torture; such a condition of affairs implies concerted action.

This meeting together of the defendants was an unlawful assembly and a disturbance of the peace of the neighborhood.

Their action was clearly and obviously wrongful and harmful to the plaintiff, as it imputed improper relations with McNayr.

The conspiracy and the acts done in pursuance thereof have caused damage to the plaintiff.

As to the damages, the jury have found that the [191] plaintiff has sustained damage to her reputation and character, and the damages are assessed at \$200. These damages are claimed in the statement of claim, and there is, as the learned county court judge has said, some evidence to sustain the finding. This case is one for exemplary damages because the defendants acted deliberately, maliciously, and wantonly with the intention B. R. C.

tion of grievously insulting the plaintiff. The case of *Doremus v. Hennessy* (1896) 62 Ill. App. 391, was a civil action for conspiracy. In that case Mr. Justice Waterman, in delivering the judgment of the court, said: "In such an action as this, where the gist of the plaintiff's suit is the damage that has resulted from the malicious acts of the defendants, punitive damages may be imposed by the jury. The amount of such damages is, within wide limits, a matter of discretion for the jury."

I may add that this case is a useful and instructive one on the subject of actions on the case for conspiracy.

In my opinion the appeal should be dismissed, with costs.

Chisholm, J. (dissenting): On the 23d day of January, 1918, while the plaintiff, a married woman, was proceeding along the public highway in a carriage with one Lambert McNayr, a married man, not her husband, the defendants fired guns, rang bells, and made other loud noises of which the plaintiff complains. She has commenced this action for damage for injury to her reputation resulting from such conduct on the part of the defendants. The demonstration, it is contended, was such as sometimes takes place in parts of the country on the occasion of a wedding; and it was intended, I must believe, to imply that plaintiff and McNayr had been recently married, and to reflect upon the plaintiff's moral character. So far as the demonstration of the defendants was criminal in its nature, they have already answered, [192] for they have been prosecuted for their breach of the peace, and in this action we have to consider only whether, under the circumstances of the case, it gave to plaintiff the right to maintain a civil action for defamation. The jury returned a verdict of \$200 in favor of the plaintiff for damage to her reputation and character. There is no averment of special damage in the statement of claim, and there was, I think, no proof of special damage given on the trial.

The question then reduces itself to this: Can the plaintiff recover in the action without proof of special damage? Or, in other words, are the acts complained of actionable *per se*?

Before the enactment of the Judicature Act, the plaintiff's action would be an action of trespass on the case. *Odgers on 10 B. R. C.*

Pleading and Practice (8th ed.) 199, 200. The usual actions for libel and slander are actions on the case; and, as stated in Sutherland on Damages (9th ed.) § 1203, "slander and libel are different names for the same wrong committed in different ways."

The unusual way in which the defendants endeavored to defame the plaintiff makes it difficult to classify their acts as a civil wrong; but after a careful consideration of the matter I do not think we are driven to decide that the defendants defamed the plaintiff either by what is usually termed a libel or by what is usually termed a slander. Slander and libel are arbitrary terms which come into the law when damage to reputation was almost invariably wrought either by word of mouth, or by writing or its near equivalent.

As regards defamation, the terms "slander" and "libel" are not exhaustive, and there may be defamation which is neither slander nor libel in the technical legal sense of the terms.

In Odgers on Libel and Slander (5th ed.): 13, after referring to the ordinary actions of libel and slander, it is said that [193] "a man's reputation may also be injured by the deed or action of another without his using any words; and for such injury he has an action on the case."

In Pollock on Torts (10th ed.) 247, it is observed: "The wrong of defamation may be committed either by way of speech or by way of writing or its equivalent. For this purpose it may be taken that significant gestures (as the finger language of the deaf and dumb) are in the same case with audible words; and there is no doubt that drawing, printing, and engraving, and every other use of permanent written symbols to carry distinct ideas, are in the same case with writing."

In my opinion, the demonstration made by the defendants does not fairly come within either mode mentioned by Sir Frederick Pollock; it was not made by way of speech, and it was not in any sense made by use of permanent or written symbols.

A case (or trespass on the case) lies where a party claims damages for any wrong not included under the head of trespass, and it includes under it the greater number of torts, *e. g.*, torts arising from negligence, frauds, etc. Dicey on Parties to Actions (2d Am. ed.) 25.

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Of that class, in my opinion, is the plaintiff's action, and in the absence of proof of special damage, I do not think she can recover.

I would allow the appeal and dismiss the action.

Mellish, J.: I would dismiss this appeal, with costs. I am of opinion that the conduct of the appellants amounted to an actionable wrong to the plaintiff without proof of special damage. The plaintiff had a right to the uninterrupted use of the highway. The demonstration complained of was deliberate and malicious, and intended to insult the plaintiff, and clearly defamatory. I think it was in the nature of a libel. The remarks, however, made by at least one of the defendants, would, [194] I think, in view of the contemporary conduct, amount to actionable slander. The jury found that the plaintiff's personal injuries did not result from the defendants' misconduct; at least, that is the way I think their finding should be interpreted in view of the evidence. Notwithstanding this, I am not at all clear that the plaintiff was not entitled to succeed on that branch of the case. I think substantial justice will be done by allowing the verdict and judgment to stand.

Appeal dismissed, with costs.

Note.—Mock serenade as actionable defamation.

In the reported case (*VARNER v. MORTON*, *ante*, 218) a recovery was sought by a married woman on account of being met by the defendants when she was returning from a drive with a married man, other than her husband, and being serenaded by them by the firing of guns, ringing of bells, shouting, etc., which was the customary way of greeting married couples in the locality. The communication here relied upon differs from an ordinary slander or libel, and presents an interesting situation not frequently met with. While a majority of the court agreed in sustaining the judgment for the plaintiff, they were divided as to the ground upon which the recovery should be allowed, the view being taken by two of the judges that the defendants' conduct constituted actionable defamation without proof of a special damage, while two other members of the court were of the opinion that the action was technically not one for slander or libel, but an action on the case for conspiracy.

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It seems clear that by a serenade of the character shown in this case the parties at whom it is aimed are held up to ridicule and contempt just as forcibly as they would be by written or spoken words directly charging them with adultery or a similar offense. No other case directly involving the point has been discovered.

In *Plunkett v. Gillmore* (1724) 8 Mod. 215, 88 Eng. Reprint, 154, Fortescue, 211, 92 Eng. Reprint, 822, it was held that an action lay for a special kind of trespass, where it was alleged that the defendant procured certain persons to come into the plaintiff's house and procured a mob to cry out "a bawdyhouse," so as to have it reported as such, by reason of which the mob threw stones and broke the windows.

And in *Jefferies v. Duncombe* (1809) 11 East, 226, 103 Eng. Reprint, 991, 2 Campb. 3, it was held that an action on the case would lie where the defendant placed a lamp near the plaintiff's dwelling, and caused it to be lighted and kept burning in the daytime, thereby marking the plaintiff's house as a bawdyhouse.

And it has been held libelous to fix a gallows, or other reproachful and ignominious signs at one's door or elsewhere. *Case of Scandalous Libels* (1605) 5 Coke, 125a, 77 Eng. Reprint, 250. J. T. W.

[ENGLISH COURT OF APPEAL.]

MALZY v. EICHHOLZ.

[1916] 2 K. B. 308.

Also Reported in 85 L. J. K. B. N. S. 1132, 115 L. T. N. S. 9, 32 Times L. R. 506, 60 Sol. Jo. 511.

Landlord and tenant — Injunction — Covenant for quiet enjoyment — Nuisance by another tenant of same lessor — Mock auctions — Liability of common lessor — Participation — Derogation from grant.

A lessor is not liable in damages to his lessee under a covenant for quiet enjoyment for a nuisance caused by another of his lessees, because he knows that the latter is causing the nuisance and does not himself take any steps to prevent what is being done. There must be active participation on his part to make him responsible for the nuisance. A common lessor cannot be called upon by one of his tenants to use for the benefit of that tenant all the powers he may have under agreements with other persons.

Jaeger v. Mansions Consolidated (1903) 87 L. T. N. S. 690, 19 Times L. R. 145, followed.

(May 9, 1916.)

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APPEAL from a decision of Darling, J., and a special jury:

In 1909 William Eichholz was lessee of a block of buildings known as 161A and 166, Strand, W.C., opposite the church of St. Mary-le-Strand, which comprised a fully licensed restaurant known as the Colonnade, approached by a corridor, two shops on either side of the corridor, and various offices on upper floors. By a lease of May 20, 1909, Eichholz demised to Amand Malzy the Colonnade, together with the licenses then or thereafter attached to the premises for keeping them open as a licensed restaurant. The [309] demise was for a term of twenty-one years from Christmas, 1908, at the yearly rent of 600*l.*, and Malzy thereby covenanted to continue to conduct the business of a restaurant so long as the necessary licenses for the retail trade of intoxicating liquors could be obtained. Eichholz covenanted that Malzy, paying the rent and performing the covenants, might occupy the premises during the term without any interruption or disturbance by Eichholz or any person or persons claiming from, through, or under him. The lease of the restaurant contained a covenant that when the tailor's shop between the restaurant and the Strand became vacant Eichholz would block up the entrance to it through the corridor which led to the restaurant, and make another entrance direct from the Strand, so that the corridor would be in the exclusive use of the restaurant. Under his head lease Eichholz had to get his landlords' consent to new tenants and to building alterations, and this was obtained and the alterations made. On March 11, 1913, Eichholz let to J. L. Castiglione the tailor's shop for the purpose of carrying on the business of "a dealer in fine arts with power to sell by auction diamonds, jewelry, plate and Japanese curios;" and Castiglione covenanted not to permit or suffer to be done any act which might be an annoyance or disturbance of the superior lessors, the lessor or his tenants, and not to assign or underlet without the consent of the lessor. In July, 1913, he gave a license to one Dent to carry on mock auctions in the shop for his own benefit. Eichholz was not asked for his permission, as it was alleged that this was not an underletting, but a mere license. Dent carried on these auctions in such a way as to be a public nuisance and call for the interference of the

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police. Eichholz frequently wrote to Castiglione to remonstrate, but took no active steps, and was told that the Dents were going away. Malzy alleged that his business was seriously interfered with and damaged by crowds and disturbances thereby occasioned, and he brought this action against Eichholz and Castiglione for an injunction and damages.

By the head lease Eichholz covenanted not to permit any public or private sale by auction upon the premises or any part thereof, or any noisy or offensive business, without the previous written consent of the landlords, or do anything which might prejudice the renewal of the licenses or become a nuisance at common law.

[310] At the trial Darling, J., left these questions to the jury, who answered them as follows:

"1. Was the business at 161A, Strand, so conducted as to be a nuisance and annoyance to the plaintiff and a prejudice to his business of a restaurant keeper at the Colonnade?"—"Yes."

"2. Was such business conducted in that manner by the defendant Castiglione or with his authority?"—"Yes."

"3. Was the business so conducted with the knowledge and assent of the defendant Eichholz?"—"Yes."

"4. Did the defendant Eichholz take all reasonable steps and make all reasonable efforts short of legal proceedings to stop such nuisance and annoyance and prejudice?"—"No."

"5. What damages has the plaintiff sustained?"—"250l."

The question was then argued whether the defendant Eichholz was liable on these findings.

Darling, J., came to the conclusion that the terms of the lease granted by the defendant Eichholz to the plaintiff, and the obligation of the plaintiff to use the demised premises as a restaurant, created an implied obligation upon the defendant Eichholz not to derogate from his own grant, and that on the findings of the jury he had done so. He therefore entered judgment for 250l. against both defendants.

Eichholz appealed.

McCall, K.C., and A. L. Morris, for the appellant. No liability attaches to Eichholz for anything which has happened. A

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landlord has never been held liable except for something done by him or by his authority. It is therefore clear that Eichholz is not liable under the express covenant for quiet enjoyment in the lease to Malzy. The presence of that covenant makes it impossible to imply from the tenant's covenant to carry on the business a covenant by the landlord that the tenant shall not be disturbed. *Line v. Stephenson* (1838) 4 Bing. N. C. 678, 132 Eng. Reprint, 950, 6 Scott, 447; (1838) 5 Bing. N. C. 183, 132 Eng. Reprint, 1075, 7 Scott, 69, 1 Arnold, 385, 7 L. J. C. P. N. S. 263, 14 Eng. Rul. Cas. 710; *Stephens v. Junior Army and Navy Stores* [1914] 2 Ch. 516, 526, 30 Times L. R. 697, 58 Sol. Jo. 808. Eichholz is not liable, for he was not personally concerned in the disturbance. *Sanderson v. Berwick-on-Tweed Corporation* (1884) 13 Q. B. D. 547, 550, 53 L. J. Q. B. N. S. 559, 51 L. T. N. S. 495, 33 Week. Rep. 67, 49 J. P. 6. In order to make a landlord liable it must be shown that he has authorized the doing of the acts complained of—*Harrison, Ainslie & Co. v. Lord* [311] *Muncaster* [1891] 2 Q. B. 680 684, 61 L. J. Q. B. N. S. 102, 65 L. T. N. S. 481, 40 Week. Rep. 102, 56 J. P. 69—and that he has participated in those acts. *Jaeger v. Mansions Consolidated* (1903) 87 L. T. N. S. 690, 19 Times L. R. 145. The lease to Castiglione cannot be said to have caused the nuisance. *Pullbach Colliery Co. v. Woodman* [1915] A. C. 634, 639, [1915] W. N. 108, 84 L. J. K. B. N. S. 874, 113 L. T. N. S. 10, 31 Times L. R. 271, Ann. Cas. 1915D, 833. Eichholz is not responsible for what was done under that lease. *Sarby v. Manchester, Sheffield and Lincolnshire Ry. Co.* (1869) L. R. 4 C. P. 198, 38 L. J. C. P. N. S. 153, 19 L. T. N. S. 640, 17 Week. Rep. 293. The fact that he continued to accept the rent did not make him a participator. He could not have been called upon to bring an action against the Dents or against Castiglione. This is said to have been a derogation from his grant, but the same reasoning applies to that. There is no evidence that these houses formed part of what could be called a building estate affected by mutual covenants.

Arthur Powell, K.C., and T. E. Haydon, for the respondent. There has clearly been a nuisance for which we ought to have a remedy. *Barber v. Penley* [1893] 2 Ch. 447, 62 L. J. 10 B. R. C.

Ch. N. S. 623, 3 Reports, 489, 68 L. T. N. S. 662; *Lyons, Sons & Co. v. Gulliver* [1914] 1 Ch. 631, 7 B. R. C. 94, 83 L. J. Ch. N. S. 281, 110 L. T. N. S. 284, 78 J. P. 98, 30 Times L. R. 75, 58 Sol. Jo. 97, 12 L. G. R. 194, Ann. Cas. 1916B, 959. The appellant put it in the power of Castiglione to give a license to the Dents to create the nuisance, and he is therefore liable to be made a defendant to a suit to restrain the nuisance. *White v. Jameson* (1874) L. R. 18 Eq. 303, 22 Week. Rep. 761; *Wintler v. Baker* (1887) 3 Times L. R. 569; *Cohen v. Tannar* [1900] 2 Q. B. 609, 69 L. J. Q. B. N. S. 904, 48 Week. Rep. 642, 83 L. T. N. S. 64. Eichholz continued to take rent from Castiglione, and that shows that he authorized the manner in which the latter dealt with his shop; it is also evidence that there was a general scheme for the use of the building. *Jaeger v. Mansions Consolidated* (1903) 87 L. T. N. S. 690, 19 Times L. R. 145; *Hudson v. Cripps* [1896] 1 Ch. 265, 65 L. J. Ch. N. S. 328, 73 L. T. N. S. 741, 44 Week. Rep. 200, 60 J. P. 393. These mock auctions were a breach of the covenant for quiet enjoyment. *Jenkins v. Jackson* (1888) 40 Ch. D. 71, 58 L. J. Ch. N. S. 124, 60 L. T. N. S. 105, 37 Week. Rep. 253.

There was also an implied obligation on the part of Eichholz not to derogate from his grant by using the rest of the building so as to interfere with Malzy's comfort. *Grosvenor Hotel Co. v. Hamilton* [1894] 2 Q. B. 836, 63 L. J. Q. B. N. S. 661, 9 Reports, 819, 71 L. T. N. S. 362, 42 Week. Rep. 626; *Aldin v. Latimer Clark, Muirhead & Co.* [1894] 2 Ch. 437, 63 L. J. Ch. N. S. 601, 8 Reports, 352, 71 L. T. N. S. 119, 42 Week. Rep. 453. Liability under the covenant is not confined to title and possession. *Jones v. Consolidated Anthracite Collieries* [1916] 1 K. B. 123, 85 L. J. K. B. N. S. 465, 114 L. T. N. S. 288; *Sanderson v. Berwick-on-Tweed Corporation* (1884) 13 Q. B. D. 547, 53 L. J. Q. B. N. S. 559, 51 L. T. N. S. 495, 33 Week. Rep. 67, 49 J. P. 6.

[312] Again, Eichholz was in the position of a trustee, and was bound to act for the benefit of his tenants, and not let them interfere with each other. Altering the front of the shop was one of the acts which enabled the auctions to be carried out. The jury found that the acts were done with his knowledge and as-

sent, so that brings him within *Jaeger v. Mansions Consolidated* (1903) 87 L. T. N. S. 690, 19 Times L. R. 145. The jury found that Eichholz consented to the doings of the Dents with knowledge of what they were. It is not contended that he was called upon to take active proceedings against the Dents to stop the nuisance. *Hall v. Ewin* (1887) 37 Ch. D. 74, 57 L. J. Ch. N. S. 95, 57 L. T. N. S. 831, 36 Week. Rep. 84; *Powell v. Hemsley* [1909] 2 Ch. 252, 78 L. J. Ch. N. S. 741, 101 L. T. N. S. 262, 25 Times L. R. 649.

No reply was called for.

Lord Cozens-Hardy, M.R., stated the facts shortly and continued: I do not think there is really much in that alteration of the shop front that is relevant to what we have to decide to-day. The alteration which was made was approved of by the lessors' surveyor, the work was done under his supervision, and the superior landlords have from that day to this in no way interfered. It seems idle to contend that that was such a breach of the conditions of the lease as might have imperiled the existence of the lease under Mr. Eichholz's title and, therefore, the title of all the sublessees. Matters went on fairly right at first. The shop window in front was taken out in this sense, that not the whole of the width was taken out, which was about 12 feet, but about 9 feet. Some glass was left on each side, and it was used, as it was intended to be used, for the purpose of an auction room, which was to be a closed auction room, and not an auction room in any way open to the street. It was used as an auction room. It is said that that imposed some obligation upon Mr. Eichholz because an auction room is a business which is very apt to be carried on in such a way as to create a public nuisance possibly as well as a private nuisance. In the present case it undoubtedly did create such a nuisance. Somebody named Dent got into possession under some arrangement with Castiglione, and they ultimately pulled out the whole width of the window,—by which I mean the few feet of glass on each side of the original opening,—and they carried on what [313] in effect was the business of a mock auction. The police interfered owing to scenes of great disorder, and the Dents were

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ultimately convicted. They or one of them were or was convicted and sentenced after a trial to a term of imprisonment. While this was going on there was all this noise and disorder. Mr. Malzy, the plaintiff, complained that his business of a restaurant keeper was interfered with, that it was a nuisance and most prejudicial to his business, and that he was entitled to damages in respect of it. The matter came before the learned judge, who dealt with the questions very carefully in his summing up. He put certain questions which the jury have answered. The first one was: "Was the business at 161A, Strand, so conducted as to be a nuisance and an annoyance to the plaintiff and prejudicial to his business of a restaurant keeper at the Colonnade?"—A. "Yes." There is no question raised before us but that that was perfectly right. Then: "Was such business conducted in that manner by the defendant Castiglione or with his authority?"—A. "Yes." Castiglione does not appeal against the judgment on the present occasion, and there is no reason to suppose that it was otherwise than perfectly right. Now comes the next question: "Was such business so conducted with the knowledge and assent of the defendant Eichholz?"—A. "Yes." I shall deal with that point more carefully a little later. Then the next question is: "Did the defendant Eichholz take all reasonable steps and make all reasonable efforts short of legal proceedings to stop such nuisance, annoyance, and prejudice?"—A. "No." And then the damages were assessed at 250*l.* and judgment was entered for 250*l.* with costs against each of the two defendants. We have heard a very able and elaborate argument from the plaintiff's counsel supporting the case against the defendant Eichholz on various grounds. The first point raised is that there was an express covenant for quiet enjoyment in the usual form in the lease to Mr. Malzy, the plaintiff, and that that has been broken by Mr. Eichholz, who has done acts which fairly amount to or which the jury were entitled to say were done with his knowledge and consent. Then it is said, even if it is not within the express covenant, there was an implied covenant for quiet enjoyment. I pass that by at once by saying that, when in a deed you find an express covenant dealing with a particular matter as to the demised premises,
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there [314] is no room for an implied covenant covering the same ground or any part of it. That is very old law. An expression of doubt upon that would be a fatal thing to the whole law of covenants, both express and implied. The very object of inserting a covenant for quiet enjoyment in a conveyance of freehold or leasehold property is to get rid of the implied covenant which is found in the word "grant" or "demise," whichever it may be. Then it is said that if the express covenant does not go far enough you can fall back upon the implied covenant from the word "grant" or the word "demise." That proposition would be absolutely contrary to the uniform practice of all owners who deal with real property, and would, moreover, be contrary to the law which has been perfectly established for more than half a century. I need not cite authority for that proposition. Then it is said there was a derogation from the grant. Now, what is the derogation? It seems to me to be nothing more or less than a statement of the same proposition, that there is a breach of the covenant for quiet enjoyment. Our attention has been called to the case of *Grosvenor Hotel Co. v. Hamilton* [1894] 2 Q. B. 836, 63 L. J. Q. B. N. S. 661, 9 Reports, 819, 71 L. T. N. S. 362, 42 Week. Rep. 626. That was a perfectly different and a perfectly clear case, if I may respectfully say so. There there was a covenant for quiet enjoyment. The lessor, not on the demised premises but on adjacent premises, caused a nuisance by working engines. That was not, of course, within the covenant for quiet enjoyment, because the covenant for quiet enjoyment extended to different matters. The fact that what he was doing on adjoining land derogated from his express grant was a matter which most legitimately and properly came into play, but was in no way intended, nor could it be deemed, to affect the general law as to a covenant for quiet enjoyment. Then there is another point which was taken, and that was the neglect of Mr. Eichholz to prevent the nuisance. The learned judge in the course of the case held that there was no breach of the covenant for quiet enjoyment; he ruled also that there was no evidence that Mr. Eichholz had participated in any nuisance; but, notwithstanding those rulings, after hearing the evidence he put to the jury the questions which I have

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read. The only point which seems to me to create any difficulty in this case is what must a landlord not do if he wants to escape liability in respect of a nuisance really commenced [315] by somebody else. I do not think that as a proposition of law the matter can be more accurately stated than in the case relied upon by counsel for the respondent, *Jaeger v. Mansions Consolidated* (1903) 87 L. T. N. S. 690, 694. Mention is there made of an unreported case of *Harris v. Bentley*, in which Lord Collins, then the Master of the Rolls, said this: "If the evidence showed acquiescence by the landlord carried to such a point as to found an inference that the landlord actively participated in the use of the flats for immoral purposes, possibly there might be a breach of the contract." The question in that case was under what circumstances the landlord might possibly be made liable for the use by one of his tenants of the flats for immoral purposes, and Lord Collins there laid down that there must be such circumstances as to found an inference that the landlord actively participated in the use of the flats for immoral purposes. The same doctrine is laid down in the judgment of the same case. I apprehend there is no authority and no principle for holding a landlord liable under a covenant for quiet enjoyment—that is to say, that he has done anything which renders him liable to damages under the covenant in respect of quiet enjoyment—merely because he knows of what is being done and does not take any steps to prevent what is being done. There must be something much more than that. There must be something which can fairly amount to his doing the act complained of or allowing the act complained of, either by actual participation by himself or his agents, or by what Lord Collins called active participation in that which was complained of. Then it is said, Just look at a number of things Mr. Eichholz did. In the first place he had no business to take out the window at all and lay the shop open to the street. Even if that were so, I do not think as between Mr. Eichholz and his superior landlord that would in any way avail the present plaintiff, Mr. Malzy. Then it was said, This auction room was such a risky business, almost notoriously one involving great noise, that he ought not to have allowed it, and ought not to have allowed it for the purpose of

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an attention room. It is quite a novel doctrine to me that permission by a lessee to use demised premises for a purpose which may or may not involve or create a nuisance is a wrong act on the part of the landlord, and that the landlord can be rendered liable merely because a person [316] does carry on that business in such a manner as to create a nuisance. It would be different, of course, if it were let for a purpose which necessarily involved a nuisance, but this letting did not necessarily involve a nuisance. That is quite plain from the plaintiff's own evidence. He says there was no ground for complaint until the Dents came into possession. Then it is said, Oh, but you knew of it and you have been receiving the rent from Castiglione, which he could not have paid unless he got it from the Dents, and therefore you knew the business was being carried on, and that would amount to consent or assent—it is put both ways—to what was done, and rendered you, Eichholz, an active participator in the nuisance which was being carried on. That proposition, to my mind, has only to be stated to show how fallacious it is. It cannot be that a landlord who according to the settled authorities is not bound to commence any legal proceedings to abate a nuisance is in this position, that unless he does commence those proceedings he cannot recover any rent, or if he does receive the rent he is to be taken to have sanctioned everything that the wrongdoer has done. Then, putting it another way, it is said, In your lease to Castiglione you had power, whenever anything was done or was threatened to be done which might have imperiled the existence of your own lease, to enter upon the premises and abate what was objectionable and do what was necessary to secure your title. That again seems to me an extraordinary proposition, but, if it be true, it is a proposition which renders Mr. Eichholz a sort of trustee of that covenant for the benefit of Mr. Malzy. In my opinion that cannot be sustained. Then what is to be said to the answer to the third question: "Was the business so conducted with the knowledge and assent of the defendant Eichholz?"—A. "Yes." I think there is no evidence whatever that it was done with the assent of Mr. Eichholz. The correspondence which we have shows from first to last he was complaining of it and was telling Castiglione that

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he ought to put a stop to it. In my view assent and knowledge are not sufficient unless you qualify it in a manner in which the learned judge has not done here as being essential to create a liability on the part of the defendant. The learned judge in his summing up seems certainly to intimate to the jury that in considering whether this was done by the authority or with the knowledge or assent of Mr. Eichholz they [317] must consider what he could have done. That is not the way to test it. He was no more bound to enter into the premises under his power, or to enter without any such power and put the shutters up in the front of the shop, than he was bound to commence an action. That, to my mind, is the only point of difficulty in the case. The learned judge said, and obviously thought, it was a case of great difficulty, and he almost invited an appeal. Notwithstanding the very able and elaborate arguments which we have heard, I think the appeal must be allowed and judgment entered for the defendant, Eichholz, with costs.

Pickford, L.J., referred to the facts and proceeded: I do not think the relations between the superior landlord and the defendant have anything to do with the rights between the plaintiff and defendant. When the alteration to the shop front was made, Castiglione took possession of the shop and carried on business there for a few months. He did not make it pay, and as he could not make it pay he either let the premises or gave a license to carry on business on the premises—I do not think it matters for this purpose which—to some people of the name of Dent. Now the Dents were described by the learned judge in the court below in this way, and I do not know that it is inaccurate: “The Dents, to put it mildly, were a gang of fraudulent criminals, and, having got these premises, they proceeded to carry on upon them mock auctions.” A good many of the gang, if I may call them so without offense, were convicted and went to prison. I do not know whether that happened to the Dents themselves; I believe it did to one of them. Whether they are there now or not I do not know, and it does not matter. The result of their carrying on these mock auctions was a great annoyance to the plaintiff and a great disturbance in the

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streets and about the premises, and, according to the finding of the jury, it was an injury to the plaintiff's business. The plaintiff and the Car Insurance Company, who were the tenants of the upper part of the premises, complained. They complained both to Castiglione and to the appellant. The appellant did write from time to time to Castiglione to try and get the nuisance put an end to. Whether he could have done more, or whether, speaking not legally but morally, he ought to have done more, is a matter upon which I do not express any opinion. Certainly the nuisance went [318] on for a long time without his taking any active steps to put an end to it. He certainly remonstrated with Castiglione, and Castiglione, who does not appear to have been altogether strictly accurate in his statements, told him on several occasions that these people, the Dents, had gone or were going. That was not true; they had not gone, and I do not think Castiglione had any assurance that they were going. Castiglione also told him that the Dents were no longer in charge of the business, but that he was selling there on commission as their agent and therefore he could see how the business was being carried on. That was not true. That is what the defendant was told, and so the business of these fraudulent people, the Dents, went on with its attendant annoyance and injury to the plaintiff.

Now the question which arises is, Is the defendant responsible for that? The plaintiff has got a verdict against Castiglione, and Castiglione does not appeal, and therefore, for what it is worth, the plaintiff retains that verdict. The defendant Mr. Eichholz does appeal, and what he says is that he is not legally responsible, whether he ought as a matter of common sense and morality to have taken steps to put an end to this nuisance or not. That is the question we have to decide. Now the first question which lies at the threshold of the case is this: Was this done by the defendant's authority? I do not think it is enough to say that it was done with his knowledge or consent, and I think in the very able argument of Mr. Haydon the word "consent" or "assent" was used sometimes in rather an ambiguous sense. I think what has to be proved is stated in the passage which has been read by the Master of the Rolls quoting 10 B. R. C.

the judgment of the then Master of the Rolls, Lord Collins, and also in this passage, in which the learned judge says in *Jaeger v. Mansions Consolidated* (1903) 87 L. T. N. S. 696: "The allegation is that some of the adjoining flats have, as I have said, been occupied for immoral purposes. Of course that would not in itself be enough to ground proceedings against the landlord, and it has been very properly admitted by the plaintiff's counsel in this case that unless they can adduce evidence from which a jury might fairly infer that the acts of the persons using these flats for immoral purposes can be construed to be the acts of the defendants in the sense that they authorized them—not [319] merely that they did not stop them, but that they were in effect a party to them—they cannot pray against them, as giving a cause of action, the fact that these premises are conducted and used for immoral purposes." Now that, of course, is a statement of the law by which we are bound, and, if I may say so without disrespect, in my opinion it is an absolutely correct statement of the law, and therefore, unless the consent or knowledge amounts to making the defendant in effect a party to the acts, it is not sufficient to make him liable. The sheet anchor of the plaintiff is, if I may say so, the finding of the jury to this effect: "Was such business so conducted with the knowledge and assent of the defendant Eichholz?—A. Yes." Now the first thing we have to look at is, what was that conduct of the business with which the jury were dealing. As to that it seems to me there is no doubt. It was the conduct of the business by the fraudulent people, the Dents. The evidence not only of the plaintiff himself, but of all his witnesses, is that until the Dents took possession there was no nuisance and no disturbance at all. It was suggested that the authority given to Castiglione to conduct auctions upon the premises, coupled with the taking away of the whole of the front of the shop so as to make the auctions take place in an open space, was of itself sufficient authority for what took place. In my opinion that is not so. Authority to conduct a business is not an authority so to conduct it as to create a nuisance unless the business cannot be conducted without a nuisance. That was decided only the other day in the House of Lords in *Pwllbach Colliery Co.* 10 B. R. C.

v. *Woodman* [1915] A.C. 634, [1915] W.N. 108, 84 L.J.K.B. N.S. 874, 113 L.T.N.S. 10, 31 Times L.R. 271, Ann. Cas. 1915D, 833, and it is perfectly clear that you may conduct an auction, even in an open shop, without a nuisance. We need not travel outside the four corners of this case to find that out, because we have evidence from all the witnesses that it was so carried on until the Dents took possession and began to carry on these mock auctions. That was the conduct of the business to which the jury were referring when they found that it was done with the knowledge and assent of the defendant Eichholz. The learned judge ruled, and in my opinion properly ruled, at the end of the plaintiff's case that there was no evidence that he participated in the nuisance. He says: "There is no evidence that he, the defendant, participated in the nuisance. The evidence is that he [320] disapproved of it. I do not think it made him a participator simply because he has not put in force an implied covenant, if ever there is such a thing." That, in my opinion, was right. I do not think there was any evidence that he assented to it in such a way as to authorize or become a participator in the act in the sense in which the words ought to be used according to the judgment of Lord Collins in the case to which I have referred. But the learned judge did leave this question to the jury, and they answered it against the defendant, and it is upon the answer to this question that so much stress has been laid: "Was such business so conducted with the knowledge and assent of the defendant Eichholz?" The jury found it was, but when I look at the summing up I do not think the learned judge had any intention of departing from his ruling, that there was no evidence that the defendant was a participator in it, because I find that the whole thing which he put to the jury as being evidence to show that it was done with his knowledge and assent was that he did not stop it. The learned judge said to the jury: "The case is put in this way: 'You had power to enter upon these premises and put this shop front back; it is quite true if you had done so the Dents would have knocked it down again; but you could have gone in under your power.'" The learned judge left that to the jury as evidence of knowledge and assent, and the jury found knowledge and assent
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upon that. If that finding is to be taken as meaning knowledge and assent such as to make the acts authorized by the defendant and the defendant a participator in them, in my opinion there was no evidence to support it. If it means, and I believe it only does mean, that it was done by his knowledge and assent—certainly with his knowledge and by his assent, because he did not take any steps to stop it—then that is not sufficient to satisfy the requirements of the passage in that judgment of Lord Collins which I have read. It was said, first, that authorizing auctions at all was sufficient to make the defendant responsible for this nuisance. I have pointed out that, in my opinion, that is not so. Then it is said he knew it, and although he remonstrated he did not mean it, but meant them to go on all the time, and although Castiglione said he was going to stop it the defendant knew quite well that he was not, and that the defendant knew quite well that he could not get his money from Castiglione unless these mock auctions did go [321] on. All I can say is those are only suggestions. I cannot find that there is any evidence of them. It is quite true that the defendant did receive his rent. He received his rent from Castiglione, and he received his rent from Castiglione at the same time that Castiglione was assuring him that this nuisance was going to be put a stop to. I cannot see that that is evidence that he was authorizing the nuisance to be carried on. I think that some of this argument proceeds upon this, that Mr. Eichholz's conduct was very suspicious, and the jury may have doubted his bona fides, and therefore they were justified in finding against him. Now that is an argument which is sometimes used, but I think it is necessary to point out that the fact that there is reason to disbelieve what a witness says does not make evidence against him. Here he said nothing in the witness box. He only said it upon paper. If there is evidence against a man, the fact that he is not called, or you do not believe him if he is called, may be a reason for accepting that evidence even though slight, but it does not make evidence, and in this case, in my opinion, there was no evidence. I do not think the receipt of the rent under those circumstances was evidence, and I do not think that the omission to take steps to stop what was going on, not by his as-

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sent, but by the act of somebody admitted by his assent, was sufficient to show that he was a participator in the sense which I have explained. If that be so, then it seems to me there was no breach of the covenant for quiet enjoyment. He did nothing, and nothing was done by anybody claiming to do the act by his authority, contrary to the covenant for quiet enjoyment. I need not say anything more on this subject, that where you have an express covenant for quiet enjoyment you cannot have an implied one. It is also put in another way. It is said there arises from the relationship of these parties an implied obligation on the part of the defendant to do whatever he could do short of bringing an action to prevent any disturbance of the business carried on by the plaintiff. That argument is based upon this, that there is in the lease to the plaintiff, as I have already said, a covenant by the plaintiff that he will carry on this business as a restaurant. From that there arises, it is said, an implied obligation on the lessor not only not to interfere with the carrying on of the business as a restaurant by the plaintiff himself, but not wilfully to permit or suffer [322] anything which would prejudice the tenant in the fulfilment of his obligations. I fail to grasp the exact meaning of "wilfully permit or suffer." If it means a deliberate act to authorize what is done, then I think there is such an obligation in all probability; but if the word "wilfully" is discarded, as I think it must be, and it merely means "permit or suffer," then I cannot see that any such obligation is involved. It does not seem to me that it imposes an obligation upon the defendant to use all the powers that he may have under any agreements with other persons for the benefit of the plaintiff. That is what it would amount to in this case. The right of compelling him to bring an action is repudiated—that is not contended; but it is said that as he had a right to enter upon Castiglione's premises in order to repair anything which might be a breach of the agreement with his head landlord, and as the opening of the whole of the front of the shop was such a breach, it was obligatory upon him to do so, and the plaintiff could compel him to bring an action against him if he did not, or to enter upon these premises and put up the front of the shop again. I do not

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think that any such obligation can be implied from the mere covenant which he exacted from the plaintiff to carry on the business as a restaurant.

Then another argument was founded upon another finding of the jury, that the defendant did not do all that was reasonable to put an end to the nuisance. What the jury found was this, that it was reasonable for him, and he might reasonably be expected, to have gone in and put up this shop front, and I suppose, according to the learned judge's summing up, put it up over and over again as soon as the Dents knocked it down. Apparently the Dents were quite capable of knocking it down as often as it was put up. I should doubt whether that finding could stand upon the evidence. I should doubt whether that was a reasonable thing to require of him; but, assuming the finding to stand, it is quite clear it cannot impose any liability upon the defendant unless he was under an obligation to use reasonable care; and, in my opinion, there being no breach of the covenant for quiet enjoyment, the covenant for quiet enjoyment not imposing upon him an obligation to use such reasonable care and the suggested implied obligation not imposing upon him such an obligation either, that finding, even if it stands, does not impose a liability upon him.

[323] There was one other ground put forward upon which the liability was alleged to exist. It was this: It is said that what the defendant did was a derogation from his own grant. I ventured to say during the argument, and I think so still, that that involves very much—I do not say entirely—the same question as the other, because it involves what the grant is. If the grant imposes an obligation to see that a disturbance does not take place and to put an end to it if it exists, then it is a derogation from the grant not to do so; but if the grant does not impose any such obligation at all, then it is not a derogation from the grant not to do it; and on the same grounds that I think there was not an implied obligation I think there is no such obligation imposed by the grant, and therefore I think that ground fails also.

With regard to the question of there being a scheme, I cannot see that there was anything in the nature of what is usually

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called in these cases a scheme existing in this case. Therefore I think that the plaintiff's case as against the appealing defendant fails and that judgment ought to be entered for him. The judgment against Castiglione of course will stand. There was no appeal against that.

Neville, J.: I am of the same opinion. It appears to me that the plaintiff could only succeed on one of two grounds, either on the ground that the defendant committed a breach of the express covenant for quiet enjoyment contained in the lease, or that what he had done amounted to a derogation from his grant. I think in either case authorization or participation in the act done by the defendant was essential to render him liable. It appears to me that knowledge and assent by no means necessarily amounts to authorization. If the finding of the jury was intended to indicate authorization—I mean the finding with regard to knowledge and assent of the defendant Eichholz—then I think that verdict had no evidence upon which it could be supported, and, consequently, I think the plaintiff's case fails on both of those grounds. I ought to say that there was clearly no authorization by the defendant Eichholz in his lease to Castiglione of the nuisance that was committed, nor do I think that there was any evidence of authorization proved. Now the next point made is this: It is said that inasmuch as there was a covenant on the part of the lessee to carry on the business of a [324] restaurant keeper, that involved by implication some reciprocal covenant on the part of the lessor. I need not consider what the terms of the covenant were supposed to be, because, in my opinion, no such covenant can be implied. I think that such a suggestion is entirely novel, and I think it would be extremely unfortunate if the courts were to recognize any such implication against the covenantor. One word about the receipt of the rent. It has been suggested that in some way the receipt of rent amounted to an act on the part of the defendant Eichholz which rendered him liable to the plaintiff in respect of the nuisance that existed. I think obviously the receipt of rent could only be material in case it was the duty of the defendant Eichholz to bring an action against his lessee, Castiglione, to eject him,
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because the only effect of the receipt of rent in this regard would be that it would be a waiver, or might be a waiver, of past infringements of the covenant, and therefore Eichholz might have lost an existing right to sue Castiglione in ejectment; but the moment you come to the conclusion I have come to, that there was no obligation whatever on the part of the defendant to sue, it is quite clear that the abandonment of the right to sue could not be material to the matter which we have to consider.

Then one other point was made. It was said there was an obligation on the part of Eichholz to sue because he was said to be a trustee for his lessee. Now the general proposition that a lessor is a trustee for his lessee of the provisions in a lease by him to an adjoining tenant is obviously not in accordance with the law. As a general proposition it cannot, I think, for one moment be supported, and I see no special circumstances in the present case to in any way support the contention that here the circumstances involved a trusteeship on the part of the defendant. It appears to me the plaintiff as against the defendant Eichholz has wholly failed and judgment ought to be entered for the latter.

Appeal allowed.

Solicitor for appellant: *John Hands*.

Solicitors for respondent: *Baddeleys & Company*.

Note.—Liability of lessor under covenant of quiet enjoyment for act of another of his lessees.

It appears well settled that, in order to hold a lessor liable on his covenant for quiet enjoyment because of a nuisance or other disturbance of possession by another lessee or tenant, there must have been some authority, either express or implied, from the lessor sanctioning the tenant's act. *Milheim v. Baxter* (1909) 46 Colo. 155, 133 Am. St. Rep. 50, 103 Pac. 376; *McCullough v. Houar* (1908) 141 Iowa, 342, 117 N. W. 1110; *Cushman v. Thompson* (1908) 58 Misc. 539, 109 N. Y. Supp. 757; *Wolf v. Eppenstein* (1914) 71 Or. 1, 140 Pac. 751; *Jeffryes v. Evans* (1865) 19 C. B. N. S. 246, 144 Eng. Reprint, 781, 34 L. J. C. P. N. S. 261, 11 Jur. N. S. 584, 13 L. T. N. S. 72, 13 Week. Rep. 864; *Sanderson v. Berwick-upon-Tweed Corp.* 10 B. R. C.

(1884) 13 Q. B. D. 547, 53 L. J. Q. B. N. S. 559, 51 L. T. N. S. 495, 33 Week. Rep. 67, 49 J. P. 6; *Jenkins v. Jackson* (1887) 40 Ch. D. 71, 58 L. J. Ch. N. S. 124, 60 L. T. N. S. 105, 37 Week. Rep. 253; *Jaeger v. Mansions Consolidated* (1903) 87 L. T. N. S. 690, 19 Times L. R. 145; *Markham v. Paget* [1908] 1 Ch. 697, 77 L. J. Ch. N. S. 451, 98 L. T. N. S. 605, 24 Times L. R. 426; *MALZY v. EICHHOLZ* (reported herewith) *ante*, 231.

It will be observed that in the reported case (*MALZY v. EICHHOLZ*), it was held that a lessor could not be held liable to a tenant on his covenant of quiet enjoyment, for damages alleged to have been sustained by reason of a nuisance created by another tenant, there being no active participation by the landlord in the creation of the nuisance, although he knew of it and took no steps to prevent it.

In *Jaeger v. Mansions Consolidated* (1903) 87 L. T. N. S. 690, 19 Times L. R. 145, referred to in the *MALZY CASE*, where the plaintiff was a tenant of a flat in a large building under a lease containing a covenant of quiet enjoyment, and also providing that the tenants should not permit the premises to be used for unlawful purposes, and a breach of these covenants on the part of the landlord was alleged by reason of the fact that other flats held under a like lease were being used for immoral purposes, it was admitted by plaintiff's counsel that unless it was shown that the acts of those using the flats for immoral purposes could be construed to be the acts of the lessor in the sense that they were authorized by him there could be no recovery. This case arose on demurrer, and it was held that it must go to trial; that it might be shown that the tenants' acts were impliedly authorized by the lessor. The decision, however, was based on the common scheme of the leases, imposing a duty on the landlord to prevent the unlawful use of the flats, the court reserving its decision as to whether there was a breach of the covenant for quiet enjoyment.

In *Wolf v. Eppenstein* (1914) 71 Or. 1, 140 Pac. 751, there was held no breach of the covenant of quiet enjoyment because of the use for illegal and immoral purposes, of other parts by tenants occupying when the lease was executed, where it was not shown that the landlord leased such other parts of the building for illegal purposes, or that any business involving moral turpitude was conducted therein with his connivance or consent.

And in *McCullough v. Houar* (1908) 141 Iowa, 342, 117 N. W. 1110, where a tenant claimed that she had been disturbed in her possession of the premises by reason of disreputable lessees of another part of the building, and sought to have the damages alleged to have been suffered set off in an action for rent, it was held that no damages could be recovered by the tenant, it appearing that after the tenant notified the landlord that disreputable subtenants were
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occupying a part of the premises under another tenant the landlord notified the subtenants to move, and the defendant thereafter paid her rent without further complaint. The court said: "The real question in this case is whether the plaintiffs did anything which would have justified the defendant in leaving the premises. The lessee cannot hold the landlord liable for injuries committed by a stranger, for the landlord is not bound to defend the premises against the wrongful acts of third persons. The record conclusively shows that the plaintiffs in this case not only did not do anything themselves to disturb the quiet enjoyment of the premises by the defendant, but, on the contrary, it is shown that they did everything which could reasonably be done to terminate the nuisance that the defendant was complaining of; and that certainly is all that the law requires."

And in *Jeffryes v. Evans* (1865) 19 C. B. N. S. 246, 144 Eng. Reprint, 781, 34 L. J. C. P. N. S. 261, 11 Jur. N. S. 584, 13 L. T. N. S. 72, 13 Week. Rep. 864, it was held that the lessor was not liable for damages for breach of his covenant of quiet enjoyment in a lease, granting the right to hunt and fish over certain land which was let to another tenant under a lease containing a reservation of timber and trees and also the right of hunting and fishing, where the other tenant destroyed rabbits and furze covers, and cut the underwood, since he had no authority under his lease to do such acts.

And in *Sanderson v. Berwick-upon-Tweed Corp.* (1884) 13 Q. B. D. 547, 53 L. J. Q. B. N. S. 559, 51 L. T. N. S. 495, 33 Week. Rep. 67, 49 J. P. 6, a lease was construed not to authorize the lessee to use a drain extending across another tenement of the lessor so as to cause an overflow on such premises, and the landlord was held not liable on his covenant of quiet enjoyment for damage done by an excessive use of the drain by an upper lessee, and which was not due to any defect in the drain, but the lessor was held liable for other damage done while there was a proper use of the drain by the upper tenant and which was caused by the drain being imperfectly constructed.

As before intimated, a lessor may be held liable to a lessee for a breach of his covenant for quiet enjoyment where he impliedly or expressly authorizes the act of another lessee in creating a nuisance or doing such other act as ordinarily constitutes a breach of the covenant.

Thus in *Markham v. Paget* [1908] 1 Ch. 697, 77 L. J. Ch. N. S. 451, 98 L. T. N. S. 605, 24 Times L. R. 426, it was held that a lessor was liable for damages for breach of an implied covenant of quiet enjoyment contained in a lease of certain premises, reserving the mines and minerals, where the lessor had executed another lease of the mining rights under the land, and authorized the removal of
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the coal without leaving any support for buildings, and damage resulted by the tenant's failure to leave sufficient support therefor.

And in *Milheim v. Barter* (1909) 46 Colo. 155, 133 Am. St. Rep. 50, 103 Pac. 376, there was held to be a breach of the implied covenant for quiet enjoyment where the plaintiff rented premises from the defendant for a boarding house, and the defendant owned the adjoining premises, which, with his knowledge and consent, were used by the tenants as an assignation house. The court said: "Any act wilfully done by a landlord which justifies the tenant vacating the leased premises, and he vacates them on this account, amounts to, and may be treated as, an eviction; and where the tenant has leased premises for a lawful purpose and has been driven therefrom before the expiration of his lease by the conduct of persons occupying adjacent premises for immoral purposes, which the landlord owns and controls, and which he knowingly permits to be occupied for such purpose, a case is made within this rule."

And there was held to be a breach of the covenant of quiet enjoyment where a lessor let other apartments on the premises and these were used for illegal and immoral purposes and, although he was notified of such use, and requested to evict the objectionable tenants, he neglected to do so, and suffered them to continue to occupy the premises for immoral purposes. *Cushman v. Thompson* (1908) 58 Misc. 539, 109 N. Y. Supp. 757.

And in *Blaustein v. Pincus* (1913) 47 Mont. 202, 131 Pac. 1064, Ann. Cas. 1915C, 405, there was held a breach of the covenant of quiet enjoyment of a lease of premises to be used as a lodging house where it appeared that the landlord, for the purpose of compelling a surrender of the lease, built a garage on adjoining property, which he rented to another tenant, and that the fumes, smells, and noise from the garage as conducted rendered the use of the premises as a lodging house unprofitable. The court said: "Appellant concedes that in the lease in question there is implied a covenant for quiet enjoyment. That the circumstances disclosed by the evidence were such as to destroy the quiet enjoyment of the Casino by the respondents were sufficient to justify them in quitting the premises and were tantamount to an eviction is too clear for discussion. . . . We are unable to appreciate the argument of appellant that because the tenants of the garage owned no machines, and the noises, fumes, and smells were occasioned by the acts of private owners who merely rented stalls in the garage, there was no such privity with Pincus as to render him responsible. Doubtless it is the rule that the acts of third persons impairing the usefulness or enjoyment of demised premises do not amount to an eviction by the lessor (24 Cyc. 1132); but nothing is shown to have occurred that might not be expected to occur in a garage; the getting of the machines in and out of the

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garage, whether by private owners or others; was a necessary incident in the business of the garage, as was also whatever noises, smells, or fumes might arise out of that process. It was to accommodate the business of a garage that Pincus designed, built, and rented the building, with full knowledge of the annoyance it might cause to the respondents. It is not at all clear that all the noises, fumes, and smells were generated by the acts of private owners, or that the lessees of the garage were in every instance innocent of actual participation therein; but whether this be so or not, it would be the refinement of artificiality to hold Pincus blameless for a result so clearly contemplated and foreseen."

And in *Wade v. Herndl* (1906) 127 Wis. 544, 5 L.R.A.(N.S.) 855, 107 N. W. 4, 7 Ann. Cas. 591, a landlord was held liable to a tenant to whom he had leased a portion of a building for an artist's studio, where he subsequently rented part of the premises underneath for an automobile livery, and the necessary method of conducting such business caused such a shaking and vibration as to damage property in the studio, and prevented the conducting of the artist's business. It does not expressly appear that the claim here was based on the covenant of quiet enjoyment.

In *Jenkins v. Jackson* (1887) 40 Ch. D. 71, there was held to be no breach of the covenant of quiet enjoyment in a lease of rooms for offices, by reason of noise and vibration caused by the use of a hall above for dancing. The court said: "To my mind, it would be an extension of the meaning hitherto given to a covenant for quiet enjoyment to say that what is really (if it is anything), a nuisance committed on adjoining land (because the room above is in that sense adjoining land) by the lessor or his tenant, is a breach of the covenant for quiet enjoyment."

In *Harrison, A. & Co. v. Muncaster* [1891] 2 Q. B. 680, there was held to be no breach of a covenant of quiet enjoyment contained in a lease of a coal mine where a lessee of an adjoining mine of the lessor, while properly working the mine, caused the irruption of underground water which overflowed the plaintiff's mine, the court holding that the result was so extraordinary that no man could have foreseen it, stating that if it was true that the parties could have contemplated the result, neither of them agreed or covenanted with regard to that result, and that result was not within the terms of the covenant.

J. T. W.

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[SUPREME COURT OF CANADA.]

LAURA BLANCHE ARNOLD and Others (*Plaintiffs*),
Appellants,
and
THE DOMINION TRUST COMPANY, Executor of the
Estate of W. R. Arnold, and ANDREW STEWART,
Liquidator of Said Company (*Defendants*), *Respondents*.

56 Can. S. C. 433.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Life insurance — Will — Appropriation to benefit of wife.

A will may be a "writing identifying the policy" within the meaning of a statute providing that a man may "by any writing identifying the policy by its number or otherwise" cause a policy of insurance on his life to be deemed a trust for the benefit of his wife for her separate use.

— Sufficiency of identification.

A will by which testator bequeathed to his wife "the first \$75,000 collected on account of policies of life insurance" does not so sufficiently identify the policy as to come within the operation of a statute which provides that a man may "by any writing identifying the policy by its number or otherwise" cause a policy of insurance on his life to be deemed a trust for the benefit of his wife for her separate use.

Corporations — Winding-up — Necessity of leave to appeal.

The provisions of § 106 of the "Winding-up Act," requiring leave to appeal to be obtained in actions against a company in process of liquidation, do not apply in the case of an action against a trust company as executor of a will and such company's liquidator, involving the construction of the will.

(April 15, 1918.)

Present: Sir Charles Fitzpatrick, Ch. J., and Davies, Idington, Anglin, and Brodeur, JJ.

[434] APPEAL from a decision of the Court of Appeal for British Columbia, 35 D.L.R. 145, affirming, by an equal division of opinion, the judgment at the trial, 32 D.L.R. 301, in favor of the defendants.

The action was brought to recover the sum of \$75,000 bequeathed to the appellant by the will of her husband, W. R. Arnold. The questions raised on the appeal were: First, whether or not leave of the court or a judge as provided by § 10 B. R. C.

106 of the "Winding-up Act" was necessary; secondly, whether or not the declaration in writing required by § 7 of the "Life Insurance Policies Act" can be made by will; and, thirdly, whether or not the devise identified the policy under the provisions of § 7.

S. S. Taylor, K.C., for the appellant. Any declaration in writing satisfies the requirement of § 7. A will is a writing, and a declaration made by will is sufficient. *Orange v. Pickford* (1858) 4 Drew. 363, at page 365, 62 Eng. Reprint, 140, 27 L.J.Ch.N.S. 808, 4 Jur. N.S. 649, 6 Week. Rep. 738; *McKibbon v. Feegan* (1893) 21 Ont. App. Rep. 87.

The designation of all the policies on testator's life identifies the policy otherwise than by number. In *Re Lynn* (1891) 20 Ont. Rep. 475; *Beam v. Beam* (1893) 24 Ont. Rep. 189; In *Re Harkness* (1904) 8 Ont. L. Rep. 720; In *Re Roger* (1909) 18 Ont. L. Rep. 649.

Lafleur, K.C., for the respondents. The declaration cannot be made by will. In *Re Watters* (1909) 13 Ont. Week. Rep. 385.

As to identification of the policy, see *MacLaren v. MacLaren* (1907) 15 Ont. L. Rep. 142.

The Chief Justice: At the hearing of this appeal an application was made by counsel for the respondent [435] to quash the appeal for want of jurisdiction. The ground put forward was that the respondent company being in liquidation, no appeal could, under §§ 22 and 101 of the "Winding-up Act," be brought without leave of the court.

In my opinion, this was founded on a misconception of the nature of the action; it is not one against the company or the liquidator, properly speaking, but only as executor of Wm. Arnold, deceased. It involves the construction of the will of the deceased. In such an action it cannot be decided what the plaintiffs can recover against the liquidator as such, but only what part of the estate of the deceased which can be so recovered the plaintiff is entitled to. If there are two persons each claiming to be entitled under a will, the liquidator as executor

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may be a necessary party to a suit to determine their rights, but it must obviously be a matter of indifference so far as the company is concerned which of the two is entitled. I have been assuming that the estate of the deceased would only have a claim on the assets of the company in liquidation, but of course if there were specific trust funds in the hands of the liquidator as executor the case would be very much stronger. The matter is complicated by the plea which the defendants have put in that the estate of the deceased is insolvent and that they are creditors against it, but clearly the facts that they may have such a defense could not be any ground for preventing the action being brought against them as executors.

Therefore I am of opinion that the action is not one which is within the prohibition of the "Winding-up Act" at all, and no leave being required, the application against the jurisdiction fails.

I am of opinion that the appeal must be dismissed [436] on the ground that the will makes no such declaration of a trust as § 7 of the "Life Insurance Policies Act," R. S. B. C. chap. 115, calls for. This section enables a man to declare that a policy effected on his life is for the benefit of his wife and children, but here we have nothing but a request to the testator's wife of \$75,000 out of the moneys which may be collected on account of policies of life insurance.

It is suggested that "the act should receive such fair, large, and liberal construction and interpretation as will best insure the attainment of its object," but this does not help us, for apart from the fact that the courts ought, if possible, to place such construction on every act as will best insure the attainment of its object, I think the object of this act is, broadly speaking, to enable a man during his lifetime to make out of his earnings a provision for his family which shall be beyond his own or his creditors' reach. I do not think it was intended to enable him to retain his insurance as his own absolute property even after his death, and under cover of the special protection afforded by the act upon distinct conditions bequeath the proceeds, which may be the whole of his estate, in fraud of his creditors. This involves to a certain extent the question into 10 B. R. C.

which I do not wish to enter, whether the declaration called for by the act can be made by will.

The Chief Justice in his reasons for the judgment appealed against says: "Assuming the will to be such a writing as is contemplated by the act."

I gather from this that he probably shares the doubts which I certainly entertain, whether a will is such a writing as the statute contemplates.

The only case in which the point seems to have received much consideration is one before the Ontario [437] courts, in which province the statute is similar to the one in British Columbia. In *McKibbon v. Feegan* (1893) 21 Ont. App. Rep. 87, a majority of the court concluded that the declaration could be made by will, but Osler, J., dissenting, delivered what appear to me to be weighty reasons for holding the contrary view.

It is not necessary to decide this point in the present case because, as I have said, I do not find that the will identifies any policy by its number or otherwise as the statute requires.

Since writing the above, my attention has been called to a newspaper report of a decision of Chief Justice Meredith, in the Province of Ontario, in the matter of the will of John Wesley Monkman, a soldier who was killed on active service. The learned Chief Justice held that a postscript to the will, though it may not be valid as part of the will, is a sufficient declaration for the purposes of the "Insurance Act."

This is a step further in the liberal construction and interpretation of the act. The writing could be no declaration during the life of the deceased, and as a general rule at any rate the law does not recognize any testamentary disposition made otherwise than by will.

Davies, J., dissenting: This appeal coming on for hearing, respondent moved to quash on the ground that leave to appeal had not been obtained under § 106 of the "Winding-up Act," and that such leave was necessary to give this court jurisdiction.

I am of the opinion that the sections of this Winding-up Act relating to appeals are, as expressed in the 101st section of the
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act, confined to "orders or decisions of the court or a single judge *in any proceeding under this act.*"

[438] This appeal from the judgment of the court of final resort in British Columbia is one conferred upon litigants by the "Supreme Court Act" itself, and is not, in my opinion, a "proceeding" under the Winding-up Act, requiring the leave of a judge before being taken, but an ordinary appeal from the final judgment of a court of last resort in the province in an action originating in a superior court. Leave to bring that action in the first instance was obtained under the 22d section of the Winding-up Act. Thereafter the litigants had their statutory right of appeal under the "Supreme Court Act." I think, therefore, the motion to quash for want of jurisdiction fails, and must be dismissed, with costs.

The question to be decided on the appeal is whether the sum of \$75,000, being part of the proceeds collected from life insurance on the life of William Robert Arnold, deceased, belongs to the appellants, who are the widow and infant children of the deceased, or constitutes part of his general estate.

The determination of that question depends first upon the construction to be given to § 7 of the "Life Insurance Policies Act" of British Columbia (R.S.B.C. (1911) chap. 115).

The act itself is entitled, "An Act to Secure to Wives and Children the Benefit of Life Insurance and to Regulate and Prohibit Insurance without an Interest in the Life of the Insured."

The 7th section, upon the construction of which this appeal depends, provides that where an assured "by any writing identifying the policy by its number or otherwise" makes "a declaration that the policy is for the benefit of his wife or of his wife and children or any of them, such policy shall inure and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the intent so expressed and declared."

[439] The deceased Arnold made a declaration in his will that the first \$75,000 collected on account of his life insurance policies should be for appellant's benefit.

If the declaration required to be made by the statute can be

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made by will, then the only question remaining is whether or not the testator has complied with the statute in the matter of identifying his policies.

Mr. Lafleur, for the respondent, contended that the statutory declaration required could not be made by will, and even if it could that this will had failed to identify the policies of insurance.

I am not able to agree with either contention. The British Columbia Statute is in all material points of its 7th section which we have to construe substantially the same as § 5 of the Ontario Act, 47 Vict. chap. 20, securing to wives and children the benefits of insurance, while § 8 of the former statute is substantially the same as § 6 of chap. 136 of the R. S. O. 1887, as amended by 53 Vict., chap. 39, § 6.

By a series of judicial decisions in the Province of Ontario, including those of the Court of Appeals of that Province, before the British Columbia Legislature enacted the statute in question, it had been decided that the words "any writing" included a last will, and I think it must be assumed that when the Legislature of British Columbia enacted the statute in question they did so with the knowledge of the judicial interpretation which had been authoritatively placed upon the Ontario statute on that point, and with the intent that such interpretation would be followed in British Columbia.

I may say that, while the question is one not free from all doubt, I agree with the conclusion the courts of Ontario had reached that the words "any writing" in the section in question included a will.

[440] As to the question whether the will in this case sufficiently identifies the policies of insurance, I am of opinion that it does. I cannot accept the argument that the maxim *ejusdem generis* should be applied to the language of the statute, and that the words "any writing identifying the policy by its number or otherwise" should be construed so as to limit the identification to something akin or similar to the number of the policy. On the contrary, I think that any language which sufficiently identified the policy or policies so as to prevent any mistake being made with respect to the declaration of trust would be sufficient.

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cient. In the case now before us, the words of the testator's bequest were: "The first \$75,000 collected on account of policies of life insurance I give to my wife, Laura," etc.

There were ten insurance policies on Arnold's life in force at the time of his death, amounting to \$425,000, and of this sum \$207,054, it is stated, had been collected. It does seem to me, alike on authority and principle, that the terms of the above bequest are sufficient to comply with the statute. The object of requiring identification of the policy or policies with respect to which a declaration of trust in favor of testator's wife or children might be made was to insure such certainty as would avoid any trouble or dispute as to the particular policy or policies of insurance as to which any such declaration applied. Any language insuring this result, however general, would, in my judgment, suffice. "The first \$75,000 collected on account of policies of life insurance" means, of course, the testator's life insurance, and, in my opinion, embraces all of testator's life insurance, and does not leave any doubt as to testator's meaning or the sources from which the fund he was creating for his [441] wife and children was to come. His object was to make a declaration of trust with respect to a specific portion of that life insurance for his wife and children. I am unable to appreciate the distinction attempted to be drawn between a bequest of *all* of his policies of insurance, which, under the Ontario authorities, would undoubtedly be sufficient, and a bequest of a specific amount "first collected on account of those policies."

The question to my mind is: Has language been used so identifying the policies as to place the question of their identity beyond doubt? I cannot see how the limitation of the amount as to which the declaration of trust was applicable, namely, the first \$75,000 collected out of testator's policies, could affect the identification of the policies from which the amount was to be collected. The fact was proved that at his death Arnold had ten life policies in force. The \$75,000 was declared to be the first \$75,000 collected from those policies. There could be no doubt, in my judgment, as to the identity of the policies out of which the fund declared to be in trust for the widow and children was to come. It is true that fund might come from

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one or more of these ten policies, but that possibility cannot alter the fact that the language of the bequest covered and identified each and all of the policies as those from which the fund bequeathed might come. It would be a narrow construction which determined that, although the words of the bequest covered and included all of the policies and so identified them, nevertheless as the \$75,000 might be collected out of one of the \$100,000 policies, or two of them, that fact operated to destroy the identification.

The fund, \$75,000, testator settled on his wife and children was to be the first \$75,000 collected on any or all of the policies, but each and all of the policies were [442] identified as being the sources, or one of the sources, from which the \$75,000 might come. Nor can I see that because one or more of the companies which issued the policies resisted payment successfully of the amount insured, such fact could affect the question of identification. The argument would be equally strong if he had identified the policies by their numbers.

I agree with the conclusion of Martin, J., who, after citing several of the Ontario cases, says: "It is but a short, easy, and logical step from these cases, where all of the policies or only one policy are or is dealt with, to this case."

My conclusions are, therefore, that we have jurisdiction to hear and determine this appeal; that the words of the statute "any writing" embrace and include a last will of a testator; and that the testator has in the present case sufficiently identified the policies out of which the fund he desired to settle upon his wife and children was to come. I would therefore allow the appeal and direct judgment to be entered accordingly for the plaintiff.

Idington, J.: I think this appeal should be dismissed, with costs. I am of the opinion that the motion to quash the appeal should have prevailed.

This action was begun after the Trust Company, respondent, had been put in liquidation by an order under the "Winding-up Act."

Presumably § 22 of that act, which prohibits the institution
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of any suit against a company after a winding-up order is made "except with the leave of the court and subject to such terms as the court imposes," was duly observed. No such order, however, appears in the case now presented for our consideration. If it was properly obtained then the whole litigation is [443] a proceeding under the act. But if it was not obtained, the whole proceeding is void, and there can be no appeal allowed to help one so acting.

It is provided by § 101 of the act that, except in the Northwest Territories, any person dissatisfied with an order or decision of the court or a single judge in any proceeding under the act may, by leave of a judge of the court, appeal therefrom.

Three classes of cases are made thus appealable. One is, if the question to be raised on the appeal involves future rights; another, if the decision is likely to affect other cases of a similar nature in the winding-up proceedings; and a third, if the amount involved in the appeal exceeds \$500.

Sec. 102 provides for such appeals being carried to the respective appellate courts of the provinces named.

Sec. 103 provides for cases in the Northwest Territories being allowed an appeal to this court by leave of a judge thereof.

Sec. 106 is as follows:

"106.—An appeal, if the amount involved therein exceeds \$2,000, shall, by leave of a judge of the Supreme Court of Canada, lie to that court from:

"(a) The Court of Appeal for Ontario;

"(b) The Court of King's Bench in Quebec; or

"(c) A superior court in banc in any of the other provinces or in the Yukon Territory."

No leave to appeal this case from the Court of Appeal for British Columbia has been given.

Having regard to the care taken by Parliament in the foregoing enactments for safeguarding any estate in liquidation under the "Winding-up Act" from becoming involved in unnecessary litigation and the [444] consequent delays and expenses thereof, I have no doubt that it intended to limit appeals to this court in the way provided by this § 106.

If that was not its purpose in thus enacting, it puzzles one
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to understand what conceivable object could have been had in view; for the \$2,000 limit named would cover almost any conceivable case and enable the parties concerned to come here by virtue of the provisions of the "Supreme Court Act" without special leave.

To hold, as I understand, the ruling directing the argument to proceed would mean, if adhered to, opening the way to appeals here in any litigation the judge in charge of the winding-up proceedings may, as I presume he did herein, permit; whenever the amount in controversy or thing involved in any way of a claim against the company or its liquidators reaches the limit set by the "Supreme Court Act" for the particular province in which the litigation may have been permitted.

It was suggested in argument that the restriction in § 106 upon appeals here was designed to be applied in cases of a proceeding under the act.

That is answered by the express language of § 106, which contains no such language as to support the argument.

There is, I submit further, no litigation with the company or its liquidator which can be permitted except by virtue of § 22, and everything permitted thereunder is a proceeding under the act in the language used in § 101.

On the merits of the questions raised in argument, I am of the opinion that the "Life Insurance Policies Act" (R.S.B.C. 1911, chap. 115) by its § 7 never was intended to cover any case of a bequest by will or indeed any revocable instrument whatever.

[445] The first sentence of that section is as follows:

"7. In case a policy of insurance effected by a man on his life is expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, or in case he has heretofore indorsed, or may hereafter indorse, or by any writing identifying the policy by its number or otherwise has made, or may hereafter make, a declaration that the policy is for the benefit of his wife, or of his wife and children, or any of them, such policy shall inure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the intent so expressed or declared;
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and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors, or from part of his estate when the sum secured by the policy becomes payable; but this shall not be held to interfere with any pledge of the policy to any person prior to such declaration."

It is expressed in the most imperative terms that in such cases, thus defined, the policy "shall inure and be deemed a trust . . . according to the intent so expressed," and so long as any object of that trust remains the money payable "shall not be subject to the control of the husband or his creditors, or form part of his estate."

It was obviously designed that the declaration should be irrevocable, and once made should not only protect the objects of the trust, but also protect the husband making it from the importunities or pressure of creditors.

It is urged that the act in question herein was copied from an Ontario act of the like import, and that the Court of Appeal for that province upheld an appointment or declaration made by will. That decision does not bind us. With unfeigned respect for the court which so decided I cannot follow the decision. I prefer the reasoning of Mr. Justice Osler, who dissented therefrom. Indeed I may be permitted to adopt the views he expressed and forbear enlarging further on that aspect of the case.

Even if I could accept any revocable instrument such [446] as a will continues to be until the maker of it is dead, there seems to me insuperable obstacles in appellant's way, in the adherent nature of the will in question.

He fails to identify the policy or policies upon which it might operate. The ascertainment thereof is left to the chances of the development of circumstances that cannot arise until some weeks after the testator's death. For there could be no payment of any policy until after probate had been obtained by the respondent Trust Company, or someone in its place, after its renunciation.

Moreover, no part of the bequest is made payable to the appellant by any insurance company, but it forms part of the

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estate and is payable out of the estate. The language of the section expressly prohibits that sort of thing.

\Sec. 15 of the act provides for the appointment by the husband of a trustee or trustees to receive the money, but that is very far from what was done in this case.

And I may add that the express provision of that section for the nomination by a husband or father by his will of such trustees seems to me, instead of helping the appellant in her argument for the declaration required by § 7 being possible by will, destroys the argument.

If the Legislature had ever contemplated such a thing, surely it would have so expressed itself.

The purpose it had in view in enacting § 7 could not be accomplished by any will or other revocable instrument. But some of those purposes could be promoted by adding the nominating power in § 15, without encroaching in the slightest degree upon the permanence and sancity of the trust that had been created by virtue of § 7.

[447] Anglin, J.: The respondent moved to quash this appeal on the ground that the leave of a judge of this court to bring it was necessary under § 106 of the "Winding-up Act" (R.S. C., chap. 144), and was not obtained. This contention rests on the view that, owing to an order for the winding-up of the defendant Trust Company, executor of the insured, having been made before this action was begun, "leave of the court" to commence it was required and was obtained under § 22 of the Winding-up Act. The like leave to proceed with the action, had it been already commenced before the winding-up order was pronounced, would have been necessary. The court, disposing of an application for leave under § 101, determines whether the pending or proposed action is one which should be permitted to go on,—whether, having regard to the nature of the action and all the circumstances, the interests of justice will be better served by allowing it to proceed, or, when that is possible, by requiring that the subject-matter shall be dealt with by the judge or officer charged with the winding-up in the course of the proceedings before him. When the leave is given the action is

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brought or proceeds in the court in which it is instituted, subject to whatever incidents, including rights of appeal, the law attaches to it. The granting of this leave, whether it be to bring an action or to proceed with one already brought, does not make of it a "proceeding under this act" within the meaning of § 101 of the "Winding-up Act." By "any proceeding under this act" is meant a proceeding in the winding-up itself, *e. g.*, the making of the winding-up order, or the allowance or disallowance of a creditor's claim, or the determination of the liability of a contributory by the judge or delegated officer under whose direction the liquidation is carried on. The right of [448] appeal in this action is conferred not by the "Winding-up Act," but by the Supreme Court Act;" and it is the ordinary appeal given by the latter act from a final judgment of a court of last resort in the province, in an action which has originated in a superior court. The motion to quash therefore fails.

The right of the plaintiff to the \$75,000 insurance money in question as a preferred beneficiary under the "Life Insurance Policies Act" (R. S. B. C. (1911) chap. 115) is contested on three grounds,—that a will is not a "writing" within the meaning of § 7 of the statute by which a declaration of trust for preferred beneficiaries may be made; that the testator did not purport to declare such a trust, but merely to make a bequest or give a legacy to his wife; that the will does not identify the policy or policies "by number or otherwise" as § 7 requires.

The material part of § 7 of the British Columbia Statute, first passed in 1895 (chap. 26), is a reproduction of § 5 of the Ontario Act to secure to wives and children the benefit of insurance, enacted in 47 Vict. as chapter 20, and carried into the R.S.O., 1887, as chapter 136. Sec. 8 of the British Columbia Statute is substantially, and so far as material, a reproduction of § 6 of chap. 136 of the R.S.O., 1887, as amended in 1890 by 53 Vict. chap. 39, § 6. It has been decided by the late Chancellor Boyd, in *Re Lynn* (1891) 20 Ont. Rep. 475, and again in *Beam v. Beam* (1893) 24 Ont. Rep. 189, that a will is a "writing" within the Ontario section; and in *McKibbin v. Feeagan* (1893) 21 Ont. App. Rep. 87, these decisions had been 10 B. R. C.

approved by the Court of Appeal (Hagarty, C.J.O., and MacLennan J.A., Osler J.A. dissenting). I think it must be assumed that the Legislature of British Columbia was appraised [449] of the judicial interpretation that had been thus definitely placed on the statutory provision under discussion when it adopted it in 1895, and that it intended that that interpretation should be followed in British Columbia. *Casgrain v. Atlantic and North West Rly. Co.* (1895) A. C. 282, at page 300, 64 L.J.P.C.N.S. 88, 11 Reports, 449, 72 L.T.N.S. 369; see also authorities collected in Maxwell on Statutes, 5 ed., at p. 500, and in 27 Hals. Laws of England, at p. 142. The "Interpretation Act" of British Columbia (R.S.B.C. 1897 and 1911) does not contain a provision excluding the application of this well-established rule of statutory construction such as we find in the R.S.C. (1906) chap. 1, § 21 (4) and in the R.S.O. (1914) chap. 1, § 20. Without expressing any view as to what should have been the construction of the British Columbia Statute had the matter come to us as *res integra*, I am of the opinion that we must now act upon the assumption that the construction placed upon the similar provision of the Ontario Act was intended by the Legislature of British Columbia to be that which should be given to § 7, and that a will, if otherwise in compliance with the requirements of that section, must therefore be deemed a "writing" within its purview.

In numerous cases in Ontario disposition by will in the form of bequests or legacies of insurance have been held to be sufficient as declarations to meet the requirements of the statute. The *Lynn Case* (1891) 20 Ont. Rep. 475, and *McKibbon v. Feegan* (1893) 21 Ont. App. Rep. 87, already cited, *Re Cheesborough* (1899) 30 Ont. Rep. 639 and *Book v. Book* (1900) 32 Ont. Rep. 206; (1901) 1 Ont. L. Rep. 86, are instances. Once it is accepted that a declaration under the statute may validly be made by will, I think it follows that words of bequest or gift are sufficient in form. It would scarcely [450] accord with the liberal construction which should prevail in the interpretation of this legislation, and would have a deplorably unsettling effect were we to hold otherwise and overrule now decisions that have stood unchallenged for twenty-five years and

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must have been acted upon very frequently since they were pronounced.

The question as to the sufficiency of the identification of the policies is in a different position. Induced, no doubt, by the desire to render as far reaching as possible the scope and operation of what they deemed remedial legislation,—to advance the remedy which it was designed to provide,—the courts of Ontario have apparently refused to apply the well-known *ejusdem generis* and *noscitur a sociis* rules to the construction of the words “or otherwise” in the phrase “by any writing identifying the policy by its number or otherwise.” They have held that where a testator had but one policy a bequest to a preferred beneficiary of his property, “including life insurance,” should be treated as a declaration under the statute sufficiently identifying that policy. *Re Harkness* (1904) 8 Ont. L. Rep. 720; *Re Watters* (1909) 13 Ont. Week. Rep. 385. There are indications in the decided cases that a bequest of a definite portion of the proceeds of the testator’s life insurance might be deemed sufficient where he had but a single policy. It has also been held that where there were several policies, a bequest of “all my property real and personal and including life insurance policies and certificates” (*Re Cheesborough* (1899) 30 Ont. Rep. 643; see, too, *In Re Cochrane* (1908) 16 Ont. L. Rep. 328) would satisfy the statute as to policies in force at the time of the making of the will, and not made payable to named beneficiaries. Probably the most recent decision [451] in *Re Monkman and Canadian Order of Chosen Friends* (1918) 14 Ont. Week. N. 29, goes further than any that preceded it. But in no reported cases, so far as I am aware, has it been held that, where the testator has several policies, a bequest of a sum smaller than their gross amount to be paid out of his insurance or to be charged upon it, without any further identification of the policies to be so affected, is a good declaration of trust under the statute.

In going as far as they did in order to attain the purpose of the legislation under consideration, the courts of Ontario have, I think, reached, if they have not overstepped, the limit of what the Legislature intended to permit when it prescribed, as a
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condition of the efficacy of "writing" designed to take life insurance out of the assets available to satisfy creditors, and make of it a trust fund exclusively for beneficiaries of the preferred class, that such "writing" should identify the policy or policies so dealt with "by number or otherwise." Any method of identification, however widely different from identification by number, has apparently been treated as sufficient.

But the decided cases have not gone the length of entirely dispensing with identification, and that, I fear, would be the result of holding sufficient a mere charge by will of an amount representing a fraction of their face value upon all a testator's life insurance, consisting of numerous policies. With respect, I cannot accept Mr. Justice Martin's view that to do so would be to take "but a short, easy, and logical step from these cases," *i. e.*, those already decided. Assuming that the identification prescribed is to be found in all of them, it would be the step from identification of some kind to no identification at all.

[452] In the case at bar, the insurance, consisting of ten policies, two of them for \$100,000 each, amounts in all to \$425,000, of which \$207,054.54 has been collected. The bequest is of "the first \$75,000 collected on account of policies of life insurance." The first \$75,000 collected might come entirely out of one of the \$100,000 policies, or it might come partly out of the proceeds of several policies. The policies might be paid in full in a single payment or only by instalments. Some might be found wholly uncollectable. The executors might proceed more promptly in making proofs of claim to one company than to another. The diligence or the readiness in meeting claims against it of one company might be greater than that of another. Upon some or all of these contingencies would depend the source or sources from which \$75,000 first collected would come, and the determination of what assets would be taken out of the estate and what would be available for creditors. It is, in my opinion, impossible to say that under such circumstances there has been any identification whatever of the policy or policies, the whole or part of which is to form the subject of the statutory trust for the preferred beneficiary. However ready or even anxious we may be to give to a statute designed "to secure to wives and

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children the benefit of life insurance," such construction as will tend to effect that purpose, we may not entirely dispense with the identification which the Legislature has seen fit to prescribe. To do so would be to legislate, not to construe.

I am, for these reasons, of the opinion that this appeal fails, and must be dismissed, with costs. The appellant, however, is entitled to her costs of the unsuccessful motion to quash which should be set off against the costs of appeal to be paid by her.

[453] **Brodeur, J.:** A motion to quash the appeal has been made by the respondent on the ground that this appeal has been taken without leave by a judge of this court.

The present action has been instituted by the appellant to claim a sum of \$75,000, being part of the proceeds from life insurance of her husband, William Robert Arnold. The question to be decided in the case is, whether that sum of \$75,000 belongs to the preferred beneficiaries of the deceased or constitutes part of his general estate.

When the action was instituted against the Dominion Trust Company, which had been appointed executors of the will of Arnold, a winding-up order had been made against the company, and under the provisions of § 22 of the "Winding-up Act" (chap. 144, R. S. C.), the leave of the Supreme Court of British Columbia was obtained.

When the appeal came up before this court, no leave was obtained, and it was contended by the respondent that the appeal should be quashed because no such leave was obtained.

Sec. 106 of the Winding-up Act says that "an appeal, if the amount involved therein exceeds \$2,000, shall by leave of a judge of the Supreme Court of Canada lie to that court from (a) the Court of Appeal in the Province of British Columbia."

The appellant, on the other hand, claims that such leave is only required in proceedings under the "Winding-up Act," and that the present action does not refer to any such proceedings.

I see that no such distinction as alleged by the appellant is to be found in § 106; that section seems to be of a general nature. It is of importance that proceedings against a company

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being wound up should be expedited with rapidity, and it is also to be found in [454] the general economy of the "Winding-up Act" that legal proceedings should not be taken unless by leave of the courts.

It is stated in § 18 that proceedings might be taken in any action against a company.

Sec. 22 provides, as I have already said, that no action might be instituted, except with the leave of the court, and the same requirements are exacted in the case of appeals. Once the winding-up order has been given, all the legal proceedings are under the control of the courts and must be instituted only with the leave of the courts.

In those circumstances, I have come to the conclusion that, the appellant having failed to obtain leave from a judge of this court before proceeding, the appeal should be quashed.

We have already decided in the case of *Ross v. Ross* (1916) 53 Can. S.C. 128, that the appeal to the Supreme Court of Canada given by § 106 of the "Winding-up Act" must be brought within sixty days from the date of the judgment appealed from, and that after the expiration of the sixty days so stated neither the Supreme Court of Canada nor a judge thereof can grant leave to appeal.

As the respondent has not made his motion within the time prescribable by the rules, he should be entitled to the costs of his motion only.

Appeal dismissed, with costs.

Solicitors for the appellants: *Taylor, Harvey, Stockton, & Smith.*

Solicitors for the respondents: *Cowan, Ritchie, & Grant.*

Note.—Sufficiency of identification of policy on assignment or change of beneficiary.

Under statutes.

In making any change of beneficiaries, or transfer of insurance, one of the most important elements is a sufficient identification of the policy. No general rule as to what constitutes a sufficient identification.
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fication can be laid down, the question depending upon the circumstances of each case. Regulation of the matter has been attempted by statute in Ontario. In that jurisdiction the statute regulating the right to change the designation for the benefit of the insured's wife or children requires that the policy be identified "by number or otherwise." Although, as subsequently shown, the courts have agreed that a liberal construction should be given the act, they have generally refused to hold the identification sufficient where there were several policies and nothing definitely showing which was intended to be referred to. It will be noted that in order to give effect to the statute some of the cases have drawn a distinction between policies payable to the insured's estate, and those in which another person was designated as beneficiary.

It will be observed that a majority of the court in the reported case (*ARNOLD v. DOMINION TRUST Co. ante*, 254) decided that a bequest in a will to the insured's wife of "the first \$25,000 collected on account of policies of life insurance" was not a writing "identifying the policy by its number or otherwise" as required by § 7 of the Life Insurance Policies Act, providing that where an assured "by any writing identifying the policy by its number or otherwise" makes a declaration that the policy is for the benefit of his wife or children it shall inure and be deemed a trust for their benefit. It will be noted that the insured here had a number of policies, and that the bequest was of a smaller amount than their total, and that it was stated that under such circumstances no case had held that there was a sufficient identification of the policies.

A somewhat analogous situation is found in *MacLaren v. MacLaren* (1907) 15 Ont. L. Rep. 142, where the testator bequeathed all of his estate to his wife, subject to a bequest to each of his four children of one quarter of the proceeds of a 5 per cent gold bond policy issued by the Travelers of Hartford, Connecticut, and it appeared that he had four such policies in the company named, each for \$25,000, and bearing the same date and identical in terms. It was held here that there was not an identification of the policy "by number or otherwise" as required by the statute. The court pointed out that the statute was passed to secure benefits to wives and children, and should receive a construction which would tend to effectuate that purpose, and said that the courts had gone far in placing a liberal construction on the act, citing *Re Cheesborough* and *Re Harkness, infra*, but concluded by saying that it was not possible to maintain that a bequest of one of four policies, any one of which might be selected to answer the bequest, was such a designation as met the requirement of the statute, that the policy should be identified by number or otherwise.

And in *Re Snyder* (1902) 4 Ont. L. Rep. 320, where after the 10 B. R. C.

death of the member's wife, who was the original beneficiary, he ordered that the benefit be paid to his children as directed by his will, and several years later he executed a will directing that the whole of his estate should be divided among his children, there being both adult and infant children, in equal shares, it was held that the benefit certificate was not identified by number or otherwise as required by the statute, and that the fund should be divided among the infant children according to the provisions of another act.

And in *Re Cochrane* (1908) 16 Ont. L. Rep. 328, where a member of a benefit society held a certificate payable to his wife, it was held that the certificate was not sufficiently identified within the statute requiring identification by number or otherwise, where he bequeathed by his will "out of my life insurance funds \$200 to my sister" and "all the rest, residue, and remainder of insurance funds, real and personal estate of what kind so ever," to his daughter. The cases of *Re Harkness* and *Re Cheesborough*, *infra*, were distinguished on the ground that in these cases the policies referred to were a part of the testator's estate, and not, as in the case at bar, policies which were not his. The court, referring to the above decisions, said: "Both cases, therefore, apply to a situation where the policies dealt with and referred to are part of the testator's estate, and not to policies which are not his, but are held subject to a trust for the designated beneficiary, and as to which he has power to alter the designation by his will. The will, as to these, operates not *quoad* his estate, but as to property over which he has and may exercise an appointing power. It is one remove from the testamentary disposition of property which is his own, and the case in hand is not covered by any decision in our courts. Where a trust is clearly and distinctly expressed on the policy itself in favor of one beneficiary, so that it becomes a vested trust for that person, it should not be displaced or altered except by a document of equal evidential force in clearness and distinctness of designation. Here, reading the will by itself, you have no evidence of identity between the policies in question and the vague expressions in the will,—'\$200 out of my life insurance funds to my sister, and the residue of insurance funds to my daughter.'"

The decision in *Re Cochrane*, *supra*, was followed in *Re Jannison* (1913) 24 Ont. Week. Rep. 391, 10 D. L. R. 608, where, under the statute, a will giving "all my insurance policies at present in force" was held not sufficient to identify a policy payable to a beneficiary other than the insured's estate.

In *Re Cheesborough* (1899) 30 Ont. Rep. 639, before referred to, where an insured held policies payable to his personal representatives, it was held that a sufficient designation under the statute requiring that the policies be identified "by number or otherwise" was

made where he executed a will bequeathing all his property, real and personal, "including insurance policies," in trust for his children.

And the decision in *Re Cheesborough, supra*, was followed in *Re Harkness* (1904) 8 Ont. L. Rep. 720, the court there holding that there was a sufficient identification of the policy under the statute where the insured held a "policy payable to his order or heirs," and by his will he gave the residue of his property "including life insurance" to his wife.

And in *Re Watters* (1909) 13 Ont. Week. Rep. 385, the case was held to fall within the *Cheesborough* and *Harkness* decisions, *supra*, where the only policy on the testator's life was payable to him, or his legal representatives, and there was held a sufficient identification "by number or otherwise" where he bequeathed two sums to two of his daughters "to be paid out of the insurance money on my life."

And in *Re Roger* (1909) 18 Ont. L. Rep. 649, it was held that the assured had identified the insurance as required by the statute requiring identification by number or otherwise, where a marriage contract gave \$3,000 insurance in the Royal Arcanum to the assured's intended wife, and after the marriage the husband dropped the insurance in the Royal Arcanum, and took policies amounting to \$5,000 in the Canada Life Assurance Company, and altered the paragraph of the marriage contract dealing with insurance by striking out "Royal Arcanum" and substituting "Canada Life Assurance Company," and "\$5,000" in place of "\$3,000."

In *Re Monkman* (1918) 42 Ont. L. Rep. 363, a subsection of the insurance law was involved which was said to have been added to the act to counteract the strict interpretation of subsection 3 of § 171, which was given in *Re Cochrane*, set out *supra*. The subsection added (subsection 5 of § 171) provided: "Where the declaration describes the subject of it as the insurance or the policy or policies of insurance or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favor of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last-mentioned declaration." The assured in this case held a policy in which his mother, father, and brother were the beneficiaries, and it was held, under the above subdivision, that the insurance passed to his wife by virtue of a soldier's will by which he bequeathed all his personal estate to his wife, there being a footnote to the effect that personal estate included insurance and everything except real estate.

And in *Lynn v. Toronto General Trusts Co.* (1891) 20 Ont. Rep. 475, it was held that the policy was identified sufficiently to satisfy 10 B. R. C.

the statute, and that under subsection 5 the insured's wife was entitled to the benefit where the certificate was payable to his devisees, and by his will he devised all of his real and personal estate, including his insurance in the "Northwestern Masonic and Aid Association" to his wife.

And in view of subsection 5 of § 171 (involved in the *Monkman Case, supra*), in *Re Cole* (1916) — Ont. —, 29 D. L. R. 492, there was held a sufficient identification of the policy where there were policies payable to a certain beneficiary, and the insured devised "all the life insurance . . . due at my death" to certain trusts.

And under subsection 5 before referred to, in *Re Baeder* (1916) 36 Ont. L. Rep. 30, 28 D. L. R. 424, where a benefit certificate was payable to the member's children equally, and he subsequently executed a will, giving all his life insurance to a grandchild, this was held sufficient to effect a change of the beneficiary.

And citing the decision in *Re Baeder, supra*, in *Re Rutherford* (1917) — Can. —, 40 Ont. L. Rep. 266, where a soldier held a policy for \$1,000 in the Metropolitan Life Insurance Company, payable to his stepmother, and another policy for \$1,000 taken by the residents of Toronto on his enlistment, and he made a will disposing of \$2,000 insurance in various sums among eight persons, \$1,000 of which he directed should go to his stepmother, and the will further provided that "in case I do not receive city insurance the above will be void, and the Metropolitan Life will go to my mother," it was held that the will sufficiently identified the insurance which was payable to the stepmother, so as to make a change of beneficiary effective.

In absence of statutory provisions.

Some cases dealing with the question whether there has been an exercise of the power of appointment vested in the insured in effect involve the question of the sufficiency of the identification of the policy.

Thus in *Smith v. Cigarmakers' International Union* (1918) 203 Mich. 249, 168 N. W. 954, a death benefit was held to pass under a will devising all of the testator's property, real, personal, and mixed, to his daughter, where the will was made after the death of the member's wife, who was the original beneficiary, and it appeared that the will was purposeless except as it served to dispose of this benefit.

And in *Belant v. Cigar Makers' International Union* (1919) 206 Mich. 127, 172 N. W. 384, where the plaintiff was the sole heir of the member of a benefit association, and there was no purpose in the member's making the will except to pass the benefit, it was held

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that sufficient appointment was made by the execution of a will devising and bequeathing "any and all estate of which I may die seised, or which I may be entitled to at the time of my decease."

And in *Grand Lodge v. Ohnstein* (1898) 85 Ill. App. 355, where the member of a benefit society filled out a form making the benefit "payable to such parties as provided for in my will," and executed a will directing that the balance of his estate, "being real, personal, and such amount as derived from life insurance," should be divided between certain persons, it was held that the endowment fund was in the nature of life insurance, and that the provision of the will disposing of such amount as should be derived from life insurance included the benefit fund and was a sufficient designation of the particular fund which was by the member's appointment made payable to the parties named in his will.

But in *Nuckols v. Kentucky Mut. Ben. Soc.* (1894) 16 Ky. L. Rep. 270, it was held that, although the member of a benefit society was authorized to dispose of the funds by will, that this was but a power of appointment, and that a residuary clause disposing of the testator's "estate not otherwise disposed of" could not be considered as an exercise of the power.

And in *Young Men's Mut. Life Asso. v. Harrison* (1890) 10 Ohio Dec. Reprint 786, where a member of a benefit association designated his mother as beneficiary, his will, devising all moneys that might be received under and by virtue of any and all policies of insurance that he had upon his life to be invested and used for the benefit of his wife and children, was held no execution of the power of appointment to change the beneficiary, it appearing that there was other insurance upon which the will could operate.

And in *Arthur v. Odd Fellows' Beneficial Asso.* (1876) 29 Ohio St. 557, there was held to be no exercise of the power to change the order of the beneficiaries fixed in the by-laws of a benefit association, who were to be preferred in the order named, unless otherwise directed prior to the member's death, where the member devised and bequeathed his "estate and property, real, personal, and mixed" to his children, it appearing that the testator was seised of real and personal property, which passed under the will, and that its words were fully satisfied without construing it to extend to the benefit insurance. The court said: "When the mode in which a power is to be executed is not defined, it may be executed by deed or will, or simply by writing; but every instrument executing a power should mention the estate or interest disposed of, and it is best, but not indispensable in all cases, to declare it to be made in the exercise of the power. 'In the case of wills it has been repeatedly declared, and is now the settled rule, that in respect to the execution of a power there must be a reference to the subject of it, or to the power itself, 10 B. R. C.

unless it be a case in which the will would be inoperative without the aid of the power, and the intention to execute the power became clear and manifest.' 4 Kent, Com. 334. 'If the will be made without any reference to the power, it operates as an appointment under the power, provided it cannot have operation without the power. The intent must be so clear that no other reasonable intent can be imputed to the will; and if the will does not refer to a power, or the subject of it, and if the words of a will may be satisfied without supposing an intention to execute the power, then, unless the intent to execute the power be clearly expressed, it is no execution of it. *Id.* 335. There is no reference to the power, or the subject of it, in the will before us; nor is there anything in the case indicating that the will would be inoperative without the aid of the power. On the contrary, the testator was seized of both real and personal property, that passed under the provisions of the will, whereby the words of the will were fully satisfied without supposing an intention to execute the power."

And in *Duvall v. Goodson* (1880) 79 Ky. 224, where the charter of a benefit society provided that if a member should leave no widow or child the fund should go according to his will, it was held that a member had a mere power of appointment in case he left neither wife nor child, and that, he having no personal interest in the fund, it did not pass under a will disposing of all of his estate.

And in *Maryland Mut. Ben. Asso. v. Clendinen* (1876) 44 Md. 429, 22 Am. Rep. 52, the *jus disponendi* given by the charter of a benefit association was held a mere power, and a will which did not express the intention to exercise the power, and which merely made a residuary bequest, was held not a valid exercise of the power, it not appearing that there was not other property upon which it might operate.

In *Aveling v. Northwestern Masonic Aid Asso.* (1888) 72 Mich. 7, 1 L.R.A. 528, 40 N. W. 28, a certificate of insurance was held to pass to the sole and general devisee under the words "all property of which I shall die seized," where it appeared that the testator intended it to pass, and the certificate was payable on the death of the named "to his devisee or, if no will, to the heir at law." The court said: "It will be seen by the will that the plaintiff is the sole devisee of all the property of the decedent. But it is argued that, although he is the sole and general devisee, the testator in his will specifically named most of the property, if not all of it, bequeathed to plaintiff, and made no mention of the insurance, thereby showing no intent to will it to him, as the words 'shall die seized' would not include the insurance, as he did not die seized of it; that such insurance would not pass to his administrator, nor would it be included in a general devise of his estate, as it constituted no part of his estate at the
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time of his death. While, technically speaking, the decedent may not have died seised of this insurance, we are satisfied that he intended to pass his insurance, as well as all of his other property, to the plaintiff.”

J. T. W.

[ENGLISH COURT OF APPEAL.]

RAWLINGS *v.* GENERAL TRADING COMPANY.

[1921] 1 K. B. 635.

Auctions — Validity of agreement by intending — bidders not to compete in bidding.

An agreement between intending bidders at an auction sale made to keep down the price, that they will not bid against each other, but that only one shall bid, and that the goods bought by him shall be shared between them, is not unenforceable as being against public policy, even though the property sold belongs to the public.

Scrutton, L. J., dissenting.

Galton v. Emuss (1844) 1 Colly. Ch. Cas. 243, 63 Eng. Reprint, 402, followed.

Dictum of Gurney, B., in *Levi v. Levi* (1833) 6 Car. & P. 239, disapproved.

Judgment of Shearman, J. [1920] 3 K. B. 30, [1920] W. N. 211, 36 Times L. R. 649, reversed.

(December 20, 1920.)

[636] APPEAL from the judgment of Shearman, J., at the trial of the action without a jury.

The plaintiff was a London merchant, and the defendant was a Mr. E. H. Bradley, who carried on business in Bermondsey under the style of the General Trading Company.

On June 12, 1919, the plaintiff attended at a sale by public auction in Dublin of surplus property belonging to the Ministry of Munitions for the purpose of purchasing certain tin shell cases, included in the catalogue, for which he had a market. He was under the impression that he would be the only purchaser of tins from England, but in the sale room he saw the defendant, whom he knew to be a dealer in tins of that description. The defendant approached him, and on finding that the plaintiff was

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going to bid for the tins proposed that in order to avoid competition one of them should bid. This was agreed to. It was arranged that the defendant should bid on their joint account, and that whatever he purchased should be divided equally between them, each paying half the purchase money. In pursuance of the agreement the plaintiff abstained from bidding, and the tins were knocked down to the defendant for the price of 342l. Two days later, on June 14, the plaintiff wrote to the defendant and offered to sell him his share of the profits for 150l. To that letter the defendant did not reply until June 27, when he repudiated the alleged agreement and maintained that he had purchased the goods on his own account alone.

[637] The action was brought to recover one moiety of the tins purchased, or 150l., the value of the said moiety over and above the price paid for it at the auction, and alternatively for an account of the profits realized by the defendant on the resale of the goods. The defendant in his statement of defense merely denied that he had entered into the agreement set out above, and alleged that he purchased the tins solely for his own account. Shearman, J., however, did not accept the defendant's account, and found the facts as above set out.

Shearman, J., held that, at any rate in such a case as this where the goods were the property of the public, it was against public policy that people should combine at an auction to procure the goods to be sold at a price considerably below the fair value, with the necessary result that the public were defrauded. He accordingly held that the contract sued on was unenforceable, and gave judgment for the defendant.

The plaintiff appealed.

McCall, K.C., and Walter Stewart, for the plaintiff. An agreement between two or more persons not to bid at a public auction is not an illegal agreement. It is perfectly valid. No one is defrauded thereby. An agreement between two persons that one only shall bid, and that the profits shall be divided between them, is also perfectly valid. Such an agreement is not against public policy, which has been compared to an "unruly horse, and when once you get astride it you never know where it

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will carry you." *Richardson v. Mellish* (1824) 2 Bing. 229, 252, 130 Eng. Reprint, 294, 9 J. B. Moore, 435, 1 Car. & P. 241, Ryan & M. 66, 3 L. J. C. P. 265, 27 Revised Rep. 603. In *Galton v. Emuss* (1844) 1 Colly. Ch. Cas. 243, 63 Eng. Reprint, 402, Knight Bruce, V.C., held an agreement to that effect to be valid and enforceable as between the parties. That case was followed in *In re Carew's Estate* (1858) 26 Beav. 187, 53 Eng. Reprint, 869, 28 L. J. Ch. N. S. 218, 4 Jur. N. S. 1290, 7 Week. Rep. 81, and *Heffer v. Martyn* (1867) 36 L. J. Ch. N. S. 372, 373, 15 Week. Rep. 390, in the latter of which cases Lord Romilly, M.R., said that he decided in *In re Carew's Estate*, *supra*, that the arrangement in that case was not illegal; "that the intending buyers" (of real estate) "may arrange between themselves which lots they will bid for and which [638] not, and agree not to compete with each other; and if they may do so in that case I think also they may take money for abstaining to compete as well as arrange to take one lot against another." The *dictum* of Gurney, B., in *Levi v. Levi* (1833) 6 Car. & P. 239, 240, that "if a knot of men go to an auction upon an agreement among themselves of the kind that has been described,"—that is, for a "knock-out,"—"they are guilty of an indictable offense, and may be tried for a conspiracy," was disapproved by Parke, B., delivering the judgment of the Privy Council in *Doolubdass v. Ramloll* (1850) 5 Moore, Ind. App. 109, 133, 18 Eng. Reprint, 836, who said that it was a mere *dictum* in a *nisi prius* case, and could not be relied on. The doctrine that certain kinds of contracts are void at common law on the ground of public policy should not be extended. *In re Mirams* [1891] 1 Q. B. 594, 595, 60 L. J. Q. B. N. S. 397, 64 L. T. N. S. 117, 39 Week. Rep. 464, 8 Morrell, 59; 1 Smith, Lead. Cas. 12th ed. p. 436. The remedy of a seller against goods being sold at too low a price is, under the conditions of sale, as might have been done in the present case, to place a reserve price on the goods.

Even if the contract as between the plaintiff and the defendant, that the plaintiff should not bid at the auction and that the goods should be divided equally between them, is not enforceable, the defendant has received goods or money in respect thereof, and the plaintiff can recover the moiety of the goods or the

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money as having been received to his use. *Bridger v. Savage* (1885) L. R. 15 Q. B. Div. 363, 54 L. J. Q. B. N. S. 464, 53 L. T. N. S. 129, 33 Week. Rep. 891, 49 J. P. 725; *De Matlos v. Benjamin* (1894) 63 L. J. Q. B. N. S. 248, 10 Reports, 103, 70 L. T. N. S. 560, 42 Week. Rep. 284.

C. Bray, for the defendant. It is admitted that there was no illegal combination to defraud. But the effect was to deprive the vendors of the fair price for their goods, and in that sense to defraud them, and the agreement is therefore against public policy and not enforceable. In *Gilbert v. Sykes* (1812) 16 East, 150, 156, 157, 104 Eng. Reprint, 1045, Lord Ellenborough said: "Wherever the tolerating of any species of contract has a tendency to produce a public mischief or inconvenience, such a contract has been held to be void." The principle of law as to contracts being void as against [639] public policy was stated by the House of Lords in *Egerton v. Earl Brownlow* (1853) 4 H. L. Cas. 1, 10 Eng. Reprint, 359, 23 L. J. Ch. N. S. 348, 18 Jur. 71, 24 Eng. Rul. Cas. 118. Lord Lyndhurst said (*id.* 160, 161): "It is a well-established rule of law that a condition against the public good, or public policy, as it is usually called, is illegal and void. . . . Each case must be determined according to its own circumstances." Lord Truro said (*id.* 196): "Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law." Lord St. Leonards, speaking of agreements in restraint of trade, said (*id.* 238), that "the common law, as it is called, has adapted itself, upon grounds of public policy, to a totally different and limited rule that would guide us at this day . . . because a partial restraint . . . is now perfectly legal." Shearman, J., applied the principle laid down in those cases to the present case. It is not necessary in this case to contend that every agreement by two or more persons not to bid against each other is illegal. In the present case State property was being sold, and the effect of the agreement was improperly to deprive the public of the difference between the price realized at the sale and the fair value

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of the goods for the benefit of the two parties. Such an agreement is illegal as being against public policy, and is unenforceable. That is especially so in the present state of affairs, because war conditions are not yet at an end. Like agreements in restraint of trade, the application of the rule of public policy may vary when circumstances change. On the facts of the present case the agreement is unenforceable. In *Gallon v. Emuss* (1844) 1 Colly. Ch. Cas. 243, 63 Eng. Reprint, 402, the circumstances were quite different. There two landowners, whose lands adjoined the land to be sold, agreed that, in consideration of one of them not opposing the purchase of the land by the other, the first-mentioned one should have the right of pre-emption in case the second [640] mentioned one purchased the land and subsequently resold it. Each of those adjoining landowners had an interest in the sale of the land, and the agreement was not against public policy. Moreover, counsel for the defendants declined to take a case for the opinion of a court of law as to the legality of the contract. The *dictum* of Gurney, B., in *Levi v. Levi* (1833) 6 Car. & P. 240, strongly supports the judgment of Shearman, J., and the only disapproval of it is in the *dictum* of Parke, B., in *Doolubdass v. Ramloll* (1850) 5 Moore Ind. App. 133, 18 Eng. Reprint, 836. This agreement "has a tendency to produce a public mischief or inconvenience" within the language of Lord Ellenborough in *Gilbert v. Sykes* (1812) 16 East, 156, 157, 104 Eng. Reprint, 1047, 14 Revised Rep. 327, and is therefore unenforceable. Cases such as *Bridger v. Savage* (1885) L. R. 15 Q. B. Div. 363, 54 L. J. Q. B. N. S. 464, 53 L. T. N. S. 129, 33 Week. Rep. 891, 49 J. P. 725, have no application to an action for the direct enforcement, not of some collateral contract, but of the contract which is itself against public policy and therefore unenforceable. It is open to the court to refuse to enforce the contract on the ground of illegality, though the point is not pleaded. *North Western Salt Co. v. Electrolytic Co.* [1914] A. C. 461, 7 B. R. C. 530, 83 L. J. K. B. N. S. 530, 110 L. T. N. S. 852, 30 Times L. R. 313, 58 Sol. Jo. 338.

[Benjamin on Sales, 5th ed. p. 464, citing *Fuller v. Abrahams* 10 B. R. C.

(1821) 6 J. B. Moore, 316, 3 Brod. & B. 116, 129 Eng. Reprint, 1226, 23 Revised Rep. 626, was also referred to.]

McCall, K.C., in reply.

Cur. adv. vult.

Bankes, L.J., read the following judgment: This is an appeal from a judgment of Shearman, J., who held that an agreement for what is popularly known as a "knock-out" at an auction was against public policy and unenforceable.

It appears to me that this case is covered in principle by the decision in *Galton v. Emuss*, 1 Colly. Ch. Cas. 243, 63 Eng. Reprint, 402, decided in 1844. No one in that case desired to contest the legality of the contract, and Knight Bruce, V.C., held the contract to be legal and founded on valuable consideration. In the later case of *Heffer v. Martyn*, 36 L. J. Ch. N. S. 372, 373, 15 Week. Rep. 390, decided in 1867, the facts were somewhat [641] different, but the Master of the Rolls, in commenting on *Galton v. Emuss*, *supra*, and a previous decision of his own in *In re Carew's Estate* (1858) 26 Beav. 187, 53 Eng. Reprint, 869, 28 L. J. Ch. N. S. 218, 4 Jur. N. S. 1290, 7 Week. Rep. 81, says this: "The question is whether this circumstance invalidates the sale. I had to consider this in the matter of *In re Carew's Estate*, *supra*, and I came to the conclusion that such an arrangement is not illegal; that the intending buyers may arrange between themselves which lots they will bid for and which not, and agree not to compete with each other; and if they may do so in that case I think also they may take money for abstaining to compete as well as arrange to take one lot against another. This also was considered to be legal by Sir J. Knight Bruce, V. C., in *Galton v. Emuss*. I am of opinion that I must follow these cases." So far as I am aware these decisions have never been questioned. A *dictum* by Gurney, B., in *Levi v. Levi* (1833) 6 Car. & P. 239, at nisi prius, to the effect that an agreement by several not to bid at an auction was an indictable offense, was expressly disapproved of by Parke, B., when delivering judgment in *Doolubdass v. Ramlohl* (1850) 5 Moore, Ind. App. 133, 18 Eng. Reprint, 845, 15 Jur. 260. Having regard to the state of the authorities in the Chancery Courts for over seventy

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years, I do not think that it was open to the learned judge to take the view he did, nor do I think that this court should, after this lapse of time, overrule those authorities, even if this court considered that they were wrong, which I am far from suggesting that they were.

If there was any conflict between the rules of law and the rules of equity on the point (which I do not consider that there was), the latter must prevail. Judicature Act 1873, § 25, subsec. 11. If the law under modern conditions requires alteration, it must, I consider, be altered by the Legislature, and for this reason I refrain from expressing my own opinion upon the point.

For the reason I have given, the appeal must be allowed, with costs, and the judgment entered for the defendant set aside and judgment entered for the plaintiff, with costs, for an account of what tins the defendant has sold or otherwise [642] disposed of, and at what price or for what consideration, and for an account of what tins remain in the defendant's possession and under his control; and for an order that half of any tins remaining in the defendant's possession or under his control and half of any profits realized by a disposal of any of the tins be handed over to the plaintiff.

A second point was made on the appellant's behalf,—namely, that, even if the agreement was against public policy and unenforceable, the respondent was bound to account for what he had received on the joint account. *Bridger v. Savage* (1885) L. R. 15 Q. B. Div. 363, 54 L. J. Q. B. N. S. 464, 53 L. T. N. S. 129, 33 Week. Rep. 891, 49 J. P. 725, was cited in support of this contention. It is not necessary to decide the point. It is sufficient to point out the vital distinction between that case and the present,—namely, that in the present case the plaintiff would be seeking to enforce the actual contract which is impeached, whereas in that case the contract sought to be enforced was held to be collateral to the one which was there impeached. See also *Sharp v. Taylor* (1848) 2 Phill. Ch. 801, 816, 41 Eng. Reprint, 1153; *Farmer v. Russell* (1798) 1 Bos. & P. 296, 126 Eng. Reprint, 913; *Thomson v. Thomson* (1802) 7 Ves. Jr. 470, 473, 32 Eng. Reprint, 190, 6 Revised Rep. 151; and *Cohen v. Kittell* (1889) L. R. 22 Q. B. Div. 680, 683, 58 L. J. Q. B. N. S. 241, 60 L. 10 B. R. C.

T. N. S. 932, 37 Week. Rep. 400, 53 J. P. 469, per Manisty, J., where this distinction is referred to.

Scrutton, L.J., read the following judgment: S. H. Rawlings claims from one Bradley, who carries on business as the General Trading Company, half the goods bought by Bradley at an auction sale in Dublin of Government stores, or their value. He claims it under an agreement between himself and Bradley, that if Rawlings did not bid against Bradley at the auction, the two should share the purchases by Bradley. Such an agreement is the simplest form of a transaction which with more parties, and a little more complication in bidding, is popularly known as a "knock-out." Shearman, J., has found the agreement proved, disbelieving Bradley's denial, but has held it unenforceable as against public policy, at any rate where the goods sold are government stores.

[643] The question is whether this contract will be enforced by the courts, and it may be unenforceable though it is neither criminal nor actionable. The position of contracts in restraint of trade has been so clearly stated by Lord Macnaghten in *Nordenfelt v. Maxim Nordenfelt Co.* [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, 6 Eng. Rul. Cas. 413, as explained and amplified by Lord Parker in *Attorney-General of Australia v. Adelaide Steamship Co.* [1913] A. C. 781, 793, 797, 109 L. T. N. S. 258, 29 Times L. R. 743, Ann. Cas. 1914A, 417, and with the concurrence of Lord Sumner in *Herbert Morris v. Saxelby* [1916] 1 A. C. 688, 707, 708, 85 L. J. Ch. N. S. 210, 114 L. T. N. S. 618, 32 Times L. R. 297, 60 Sol. Jo. 305, Ann. Cas. 1916D, 537, as to excuse any but the briefest restatement. Contracts or combinations in restraint of trade are neither criminal nor actionable at common law unless they can be made out to be conspiracies to attain an unlawful end, or a lawful end by unlawful means; and it is not unlawful to combine to protect your own trade interests, though by so doing you injure another. But such contracts or combinations, though neither criminal nor actionable, may be unenforceable. Of the Law Lords who held that the combination of a "ring" in *Mogul Steamship Co. v. McGregor* [1892] A. C. 25, 61 L. J. Q. B. N. 10 B. R. C.

S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101, gave no cause of action to the shipowner it drove out of the trade, Lord Halsbury, L.C. *Id.* 39; Lord Watson, *Id.* 42; Lord Bramwell, *Id.* 46; Lord Morris, *Id.* 51, and Lord Hannen, *Id.* 58, all said that the agreement to combine was unenforceable.

It is not therefore necessary to find that the agreement in the present case is either criminal or actionable at the suit of the vendors. I am clearly of opinion it is not. The question is whether it is contrary to public policy as in restraint of trade, and therefore not enforceable.

Now, as explained by Lord Parker in *Herbert Morris v. Saxelby*, *supra*, two tests have to be considered: First, Is the restraint of trade imposed by the contract reasonable in the interests of the parties,—*i. e.*, does it afford no more than adequate protection to the party in whose favor it is imposed? Secondly, Is the restraint of trade reasonable in the interests [644] of the community or the public? If it is reasonable in the interest of the parties, the party alleging unenforceability on the second ground must prove it. Now in this case the plaintiff was by the contract restrained from bidding at the auction. As between the parties I see nothing unreasonable in this; he was to get half the goods bought at a price which would be lower because he did not bid, and might therefore well be restrained from bidding and so raising the price. But the effect on the public or the community was that free competition at auctions, affording a ready market for realizing goods, was restrained, and the property of any member of the public selling goods might be sold below its true value. This is especially true where the goods sold were those of the public themselves, by the State. In this case goods bought for 342*l.* have apparently been resold for at least 642*l.*, a profit on expenditure of nearly 90 per cent. The agreement, if carried out or enforced by injunction, would deprive the public of the advantage of free competition at auctions. I cannot think the courts would enforce by injunction an agreement not to bid at an auction.

The decisions on auctions, with one exception, throw very little light on this matter. At law, at a sale advertised as to the highest

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bidder, the vendor might not employ a "puffer" to bid on his behalf. *Mortimer v. Bell* (1865) L. R. 1 Ch. 10, 5 New Reports, 501, 35 L. J. Ch. N. S. 25, 11 Jur. N. S. 897, 13 L. T. N. S. 348, 14 Week. Rep. 68. This was because it was a breach of his representation that the highest bidder other than himself would get the goods, and was rested on fraud. Attempts by vendors to reopen a contract of sale as obtained by fraud, where the purchaser had agreed with someone else that the latter should not bid against him, failed because there was nothing fraudulent or illegal, in the sense of criminal, in such a bargain. *In re Carew's Estate* (1858) 26 Beav. 187, 53 Eng. Reprint, 869, 28 L. J. Ch. N. S. 218, 4 Jur. N. S. 1290, 7 Week. Rep. 81, in which the attempt to attack the agreement was rested on fraud on the authority of a passage in Sugden's Vendors and Purchasers; *Heffer v. Martyn* (1867) 36 L. J. Ch. N. S. 372, 15 Week. Rep. 390. These were cases between vendor and purchaser, where the contract between them was unaffected unless the purchaser had obtained it by fraud [645] on the vendor. In *Galton v. Emuss* (1844) 1 Colly. Ch. Cas. 243, 63 Eng. Reprint, 402, however, the court of equity did enforce an agreement between owners of neighboring landed estates not to bid at an auction for land, on the terms that one should have a right of pre-emption over the lands of the other. This latter right was enforced by specific performance. It is to be noted that the parties were offered an argument in the courts of law on the legality of such a contract, and refused, so it was taken there was no authority against the legality of the contract; and the point of restraint of trade was not argued. This may turn on the relations of neighboring land-owners, and does not seem to me to apply to sales of goods; anyhow the question of law was not argued, and I cannot regard it as a decision binding me to hold that the contract in this case is not in restraint of trade as injurious to the interests of the public.

It is true that the point of illegality of the contract was not pleaded; the defendant only said there was no such contract. *North Western Salt Co. v. Electrolytic Co.* [1914] A. C. 461, 7 B. R. C. 530, 83 L. J. K. B. N. S. 530, 110 L. T. N. S. 852, 30 Times L. R. 313, 58 Sol. Jo. 338, in which I was the trial
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judge, decides clearly two points: First, that where illegality by restraint of trade is not pleaded, and the question whether the restraint be unreasonable in the interests of the public may depend on a number of circumstances not pleaded or proved, the court itself should not take the point, as the plaintiff has had no opportunity of producing the necessary evidence. This is especially true in trade agreements fixing prices, where the numerous considerations pointed out by Lord Haldane, L.C., *Id.* 469, 470, have to be weighed. In the case in question the Court of Appeal had derived most of their material for unenforceability from a collateral agreement not the one sued on. But, secondly, the judgments of the court make it clear that where all the facts are before the court, and it can see clearly that it is contrary to public policy to enforce the agreement, the court should act, though the pleadings do not raise the point. The result may be to leave unfair and ill-gotten gains in the hands of one of the parties, but that [646] is a frequent consequence of entering into unenforceable agreements.

In this case I am satisfied that all the relevant materials are before the court, and on them I am of opinion that the contract sought to be enforced is against the public interests. There is in this case no account stated which would allow the action to be brought, though the executed consideration was unenforceable if executory, as was the case in *Evans & Co. v. Heathcote* [1918] 1 K. B. 418, 431, 87 L. J. K. B. N. S. 593, 118 L. T. N. S. 556, 34 Times L. R. 247; *Bishop v. Kitchen* (1868) 38 L. J. Q. B. N. S. 20, did decide that after consideration executed a contract in restraint of trade could be enforced, but that case was so doubted in *Evans & Co. v. Heathcote* [1918] 1 K. B. 427, 428, 431, 437, that I cannot follow it, and think it was wrongly decided.

It was, however, suggested by the court that this might be one of the cases where B. has received on behalf of C money from A under a contract which is illegal or void, but cannot successfully object to pay it to C on the ground of such illegality. Examples of such cases are *Tenant v. Elliott* (1797) 1 Bos. & P. 3, 126 Eng. Reprint, 744, 4 Revised Rep. 526; *Farmer v. Russell* (1798) 1 Bos. & P. 296, 126 Eng. Reprint, 913; *Sharp v.*
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Taylor (1848) 2 Phill. Ch. 801, 41 Eng. Reprint, 1153, and *De Mattos v. Benjamin* (1894) 63 L. J. Q. B. N. S. 248, 10 Reports, 103, 70 L. T. N. S. 560, 42 Week. Rep. 284. But in all these cases there was no illegality between plaintiff and defendant; the defendant was saying the money had come to him as the proceeds of an illegal contract, and therefore one of the parties to the illegal contract could not claim it from him, though the other party did not object to its being paid over. The case appears quite different where the unenforceability is in the direct contract between the plaintiff and defendant, not in a collateral contract under which the defendant has received the money. This is the distinction taken by Sir William Grant, M.R., in *Thomson v. Thomson* (1802) 7 Ves. Jr. 470, 32 Eng. Reprint, 190, 6 Revised Rep. 151: "You have no claim to this money except through the medium of an illegal" (unenforceable) "agreement . . . and it is impossible for the court to enforce it." See also Pollock on Contracts, 8th ed. p. 398. Here if, as I have held, the contract is unenforceable as in restraint of [647] trade, the plaintiff is trying to enforce it in asking for the goods due to him under it. It is true the defendant does not plead illegality but denies the contract, but, this being found against him, if the court is satisfied that the contract is unenforceable as in restraint of trade, the court itself is bound to take the point, and not to enforce a contract contrary to public policy.

For these reasons, I think the judgment of Shearman, J., should be affirmed and the appeal dismissed, with costs. I cannot believe that, if the parties to an agreement for a knock-out came to the court for an injunction to restrain one of their members from bidding at the auction contrary to his agreement, the court would grant the injunction. The court would refuse it, in my view, because the agreement was contrary to public policy, as a restraint of trade contrary to the interests of the public. Nor would the court take an account of the profits resulting from a knock-out for the same reason.

I only desire to add that in saying these agreements are not criminal or actionable, I do not refer to any cases in which intending purchasers are induced not to bid by threats of violence or misrepresentations.

Atkin, L.J., read the following judgment: The learned judge has held that the agreement made between the parties, as stated by the plaintiff whose evidence was accepted by him, is void as being against public policy. The ground is stated in the report in the Law Reports as follows [1920] 3 K. B. 35: "I am of opinion that, at any rate in such a case as this where the goods sold are the property of the public, it is against public policy that people should combine at an auction to procure the goods to be sold at a price considerably below the fair value, with the necessary result that the public are defrauded." The only evidence as to the price eventually obtained being below the fair value appears to be the fact that the plaintiff offered to sell to the defendant, who had bought the goods in very large quantities for 342*l.*, his half share of the net profit in the disposal of them for 150*l.*,—a total profit which would [648] amount, in commercial computation, to something less than 50 per cent. I am quite unable to see any evidence of any such combination as is suggested. Under the conditions of sale the auctioneer had power to fix a reserve price. Whether there was a reserve price for these goods is not proved. In any case there is no evidence that the price was not satisfactory to the seller or to the auctioneer. But assume that the goods had to be sold to the highest bidder, would it have been illegal for either plaintiff or defendant to absent himself from the auction, or, being there, to refrain from bidding? And if not, would it have been illegal for both to have agreed to absent themselves or refrain from bidding? The result would presumably have been still worse for the seller, for the prices would not have been raised to the level of the defendant's bids. I see no principle upon which sales by auction differ from an offer of sale by tender or indeed by private treaty, except that at an auction without reserve the goods are offered to the purchaser who there and then offers the highest price. Why it should be illegal for two possible competitors to agree to a joint adventure in the purchase of an article offered for sale in any of the ways I have mentioned I cannot discern. If, of course, there is any combination to make misrepresentations, express or implied, with intent to deceive the seller, which are proved to have deceived the seller, the seller will presumably have his remedy, and the agreement so to

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deceive will be illegal and unenforceable; but I can see no evidence of such an agreement in the present case. The only suggestion made was that the plaintiff said in evidence: "I bid against the Irish buyers to show strength." There is no evidence that this was done in pursuance of the agreement between the parties, and with no other evidence it appears to me to fall far short of evidence of an agreement to defraud. The learned judge relies for authority on a *nisi prius* report (in 1833) of a passage in the summing up of Gurney, B., to a jury in *Levi v. Levi* (1833) 6 Car. & P. 239, 240. The action was for slander in saying of the plaintiff: "You are a common thief, and I can prove you one." It is not stated whether there was a plea of [649] justification. The report states that from the cross-examination of the plaintiff's witnesses it appeared that certain brokers attending auction sales took part in what was then and is now called a "knock-out." The report does not state that the plaintiff was such a broker. The report proceeds to give as an extract from the summing up the following sentence: "Owners of goods have a right to expect at an auction that there will be an open competition from the public; and if a knot of men go to an auction upon an agreement among themselves of the kind that has been described, they are guilty of an indictable offense, and may be tried for a conspiracy;" and then states that the judge "left it to the jury to say whether the defendant by the words he spoke meant to impute felony to the plaintiff? Verdict for the defendant." If, as must be assumed, the only issue between the parties was that left to the jury, the remark was a mere *dictum*, and unless the practice was brought home to the plaintiff would be irrelevant even to damages. The learned judge states that it met with the approval of Mr. R. S. Wright, afterwards Wright, J. The passage in Wright on Criminal Conspiracies, ed. 1873, p. 34, is as follows: "A case (1833, *Levi*) in which a 'knock-out' at an auction was held indictable, may be thought to have gone to the farthest extent which is compatible with the application of any principle. It may be explained on the ground that, had the auctioneer known of the combination, he would not have knocked down the goods to any of the persons concerned in it; that his consent to the transfer of property was obtained by a false appear-

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ance of competition." So tepid an approval, if approval it be, does not appear sufficient to infuse warmth into a *dictum* already killed in 1850 by Parke, B., in delivering the judgment of the Privy Council in *Doolubdass v. Ramlooll*, 5 Moore, Ind. App. 133, 18 Eng. Reprint, 845.

There remains the question whether the contract is void as being in restraint of trade, a question not raised upon the pleadings, or as far as I can see, at the trial. The principles applicable to such a set of circumstances are laid down by the House of Lords in *North Western Salt Co. v. Electrolytic [650] Co.* [1914] A. C. 461, 7 B. R. C. 530, 83 L. J. K. B. N. S. 530, 110 L. T. N. S. 852, 30 Times L. R. 313, 58 Sol. Jo. 338. There the plaintiffs sued upon an agreement which involved an obligation upon the parties not to sell salt except at agreed prices and in agreed quantities. The defense of restraint of trade was not pleaded, and the trial judge had refused to allow it to be raised by amendment at the trial. The Court of Appeal by a majority gave effect to their view that the contract was in restraint of trade. On appeal the House of Lords reversed this decision. I will cite two passages. Lord Haldane, L.C., said (*id.* 470): "My Lords, the law as to contracts in restraint of trade is not doubtful. In order to be valid a clause imposing a restraint must be reasonable, and he who says that the restraint is so must make it out. But he will discharge this burden if he can point to other parts of the contract which show the reasonableness of the restraining clause. If the contract read as a whole appears on the face of it not to be unreasonable in the interest either of the parties or of the public, that is enough, and the question is not one of evidence. Evidence may, indeed, be given as to the character of the business and the circumstances. But it cannot be given on the question of the reasonableness of what appears on the face of the document when construed in the light of the circumstances as to which evidence is admissible. The question is one of law for the court, and is not an issue of fact. My Lords, when the controversy is as to the validity of an agreement, say for service, by which someone who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law

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looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude,—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves.” Lord Haldane quotes (*id.* 472, 473). Lord Parker in *Attorney-General of Australia v. Adelaide Steamship Co.* [1913] A. C. 796, Ann. Cas. 1914A, 417, as saying that it is “clear that the onus [651] of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and that if once the court is satisfied that the restraint is reasonable as between the parties this onus will be no light one.” Then Lord Haldane goes on: “My Lords, I desire to adopt this proposition as applicable to the question before us. For the reasons I have given, I do not think that, consistently with the principle so expressed, a court of justice is at liberty to infer from the terms of the contract in controversy that it is directed to establishing either a pernicious monopoly or a state of things injurious to the public.” Lord Moulton, in dealing with the defense of restraint of trade as being contrary to public policy, said ([1914] A. C. 476, 7 B. R. C. 530): “This reasoning would be sound in the case of a properly constituted action, where the defense of illegality is duly raised on the pleadings. The court would then be entitled to assume that it had before it, in evidence, all the relevant surrounding circumstances. If any be missing it is the plaintiff’s own fault, and he must take the consequences. In such a case the legal motto, *De non apparentibus et de non existentibus eadem est ratio*, is rightly applied. But it is not so where the issue is not raised on the pleadings. The plaintiffs have received no notice that the point will be raised, and are presumably not prepared with the necessary evidence. Even if they are in a position to call the evidence, they are not at liberty to do so, because they are only entitled to call evidence on the issues raised by the pleadings. The facts before the court at the end of the case are, therefore, only a casual selection from the surrounding circumstances, and the court has no longer the right to treat them as properly and fully representing

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those surrounding circumstances so as to justify its pronouncing on their true effect upon the contract. It may be shortly put as follows: If the contract and its setting be fully before the court it must pronounce on the legality of the transaction. But it may not do so if the contract be not *ex facie* illegal, and it has before it only a part of the setting, which it is not entitled to take, as against the plaintiffs, [652] as fairly representing the whole setting." I can see no reason for saying that this contract is *ex facie* illegal. It would probably be sufficient to say that for nearly a century courts of equity have held similar agreements legal and enforceable by suit for specific performance. But apart from decided cases, as between the parties it appears to be plainly reasonable, and if the defendant wished to establish that the public interests suffered he should have so pleaded so as to give the plaintiff notice. If I may adopt the language of Lord Sumner in the case above cited ([1914] A. C. 481, 7 B. R. C. 530): "I should require to know much more of the conditions of the trade and of the effect of such arrangements as these before I could profitably express any opinion on the practical rights and wrongs of the sale of" these tins.

Whether, if the agreement not to bid were void as being in restraint of trade, the defendant could nevertheless, when the agreement is executed, hold for his own use the goods which undoubtedly he bought on joint account, and whether it could be said that there was no severable legal relation between the parties, is a question that, on my view, it becomes unnecessary to discuss. I content myself with saying that the contrary view can be plausibly argued.

I think that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Bolton, Jobson, & Yate-Lee.*

Solicitor for defendant *G. S. Crawshaw.*

Note.—Validity and effect of agreements not to bid at auctions.

Attention is called to the fact that this note is confined to agreements not to bid at ordinary auctions.

The great majority of cases in which the validity of agreements
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not to bid have arisen have been cases involving judicial sales, and these are exhaustively covered in other annotations, to which the user is referred for general principles.

The question of validity of agreement to purchase property at judicial sale for joint benefit is covered in the annotation to *Coal & C. R. Co. v. Marple*, 38 L.R.A.(N.S.) 719.

And as to suppression of competition at execution or other judicial sales, see annotation to *Ruis v. Branch*, 42 L.R.A.(N.S.) 1198.

And generally as to effect of preventing or checking bids upon the validity of sales at auction, see annotation to *Herndon v. Gibson*, 20 L.R.A. 545.

It will be observed that in the reported case (*RAWLINGS v. GENERAL TRADING Co. ante*, 278) an agreement between several intending bidders at an auction sale, made to keep down the price, that they would not bid against each other, but that only one should bid and that the goods bought by him should be shared between them, was not against public policy and unenforceable, even though the property sold belonged to the public. Scrutton, L.J., dissented and a contrary decision had been reached by the lower court.

In *Galton v. Emuss* (1844) 1 Colly. Ch. Cas. 241, 63 Eng. Reprint, 402, which was relied upon in the reported case (*RAWLINGS v. GENERAL TRADING Co.*) it was held that an agreement between owners of property adjoining land to be sold at auction, that one should not bid while the other was a competitor, was not illegal, and that it constituted a good consideration for a contract providing for a right of pre-emption to the one refraining to bid.

And the decision in the *Galton Case* was relied upon in *Canadian P. R. Co. v. Grand Trunk R. Co.* (1907) 14 Ont. L. Rep. 41, where an agreement between two railroads desiring certain land, that one would not bid against the other, and that the latter upon receiving a conveyance should divide the land equally with the company which had refrained from bidding, was held not illegal.

And in *Heffer v. Martyn* (1867) 36 L. J. Ch. N. S. 373, 15 Week. Rep. 390, an agreement by a prospective purchaser at an auction sale to pay another prospective purchaser a certain sum not to bid was held not to invalidate the sale, although by reason of such agreement the property was sold at the auction for about half its value. The court stated that the remedy in such a case was in fixing the reserved bidding high enough so that the real value would be obtained.

And the court in *Piatt v. Oliver* (1837) 1 McLean, 295, Fed. Cas. No. 11,114, was of the opinion that an agreement between two companies desirous of purchasing government land at auction not to bid against each other, and that land purchased at the sale should be for the joint benefit of the companies, would be valid, but it was unnecessary for them to decide this point.

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And it has been held that an agreement between prospective bidders at an auction sale of town lots, that one should bid for the benefit of both for a certain lot, and that it should be divided between them, is valid. *Jones v. Fulcrod* (1851) 5 Tex. 511, 55 Am. Dec. 743. The court said: "The law does not require that all who attend at public auctions should compete for all or any of the articles exposed to sale. Were this the case bidders might be subjected to the most ruinous sacrifices to promote the interests of the vendors. They may abstain from action, if it be their pleasure or conduce to their advantage. But should they act they cannot be required to purchase in any other mode or on any other terms than may be advantageous to their own interests. They cannot be permitted to enter into combinations to stifle competition with the design of purchasing property at less than its fair value, but they may unite in any such number as may be necessary to make the purchase advantageous to themselves, provided this junction of interests be without any 'dishonest motives' or injurious consequences. It is difficult to determine from the adjudications what is meant by fair competition; but it would seem that it may be defined to be such 'as arises from the interests of the bidders,' without restraint or check from any fraudulent confederacies, tricks, or artifices to promote that interest at the expense and injury of the vendor or others interested in the property. The competition must, at least, depend entirely upon the interest of the bidders; and while the rights of the vendor are to be guarded, yet the vendees have the right to consult and promote their own interests, but without resort to any fraudulent artifice for that purpose. The facts set forth in the petition show no fraudulent combination or artifice to stifle fair competition, to the injury of the vendor, or to secure the lot at less than its value. The entire lot was exposed for sale. The vendor had a right to sell the lot in one body or in as many subdivisions as might be deemed advantageous to her interests, or she could at pleasure have withdrawn the lot from sale altogether. But no such option was in the power of the purchasers. Neither of them desired to own the whole of the property, but they had not the privilege of each bidding for a separate portion. Their mutual interests and benefit could be promoted only by bidding jointly, or by one bidding for their joint benefit with an agreement for a subsequent division, so as to appropriate to each that portion which was the object of his uniting in the purchase or bidding at all. This agreement was not dishonest in its motive or injurious in its consequence. There was no attempt to stifle competition or defraud the vendor of a fair price."

The decisions on the question under consideration, however, are not in harmony.

Thus, in the following cases, agreements not to bid at ordinary auctions, made for the purpose of stifling fair competition, were held
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fraudulent and invalid. *Carrington v. Caller* (1829) 2 Stew. (Ala.) 175; *Gardiner v. Morse* (1845) 25 Me. 140; *Fletcher v. Johnson* (1905) 139 Mich. 51, 111 Am. St. Rep. 401, 102 N. W. 278; *Kine v. Turner* (1895) 27 Or. 356, 41 Pac. 664; *Hale v. Henderson* (1843) 4 Humph. 199; *Ney v. Ladd* (1902) — Tex. Civ. App. —, 68 S. W. 1014; *Ralphsnyder v. Shaw* (1898) 45 W. Va. 680, 31 S. E. 953.

In *Kine v. Turner* (1895) 27 Or. 356, 41 Pac. 664, it was held that a contract between prospective purchasers of government land at a public auction, that if one would refrain from bidding the other would convey a part of the land which he purchased to the other when the patent was received, was against public policy and void.

And in *Hale v. Henderson* (1843) 4 Humph. 199, an agreement between prospective purchasers at a sale of public lands, for the payment of a certain sum if the other would not bid on the land, and would use his influence to keep others away, was held fraudulent and void.

And an agreement by one appointed by the owner of property to be sold at auction by custom officials to bid for her, that for a certain consideration he would not bid against another at the sale, was held fraudulent and void. *Ney v. Ladd* (1902) — Tex. Civ. App. —, 68 S. W. 1014.

And in *Carrington v. Caller* (1829) 2 Stew. (Ala.) 175, an association consisting of members admitted on payment of a certain amount, and an agreement by them not to bid at auction sales of government land, and which provided for a resale at public auction, was held against public policy and void, and a resale of the land in pursuance of the terms of such illegal agreement was also held illegal so that no recovery could be had on a bond given by a purchaser at a resale.

And in *Fletcher v. Johnson* (1905) 139 Mich. 51, 111 Am. St. Rep. 401, 102 N. W. 278, an agreement between two stockholders in a corporation, each of whom desired to control the company, that one of them should bid for both at a public sale of stock, and that the stock purchased should be divided equally, entered into to prevent competition in bidding, was held contrary to public policy and void.

And in *Gardiner v. Morse* (1845) 25 Me. 140, an agreement between a prospective bidder and the maker of a note to be sold at auction by the holder, that if the prospective bidder would not bid the maker would discharge a note of the prospective bidder held by the maker, was held fraudulent and unlawful.

And the court in *Crozier v. Carr* (1854) 11 Tex. 376, stated that if an agreement was made by one with another to purchase property at a trustee's sale for the purpose of depreciating the price, it would be fraudulent and void.

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And an agreement between two bidders at an auction that one of them should stop bidding and stand by to advise the other how much to bid, and that the latter should buy the property for their joint benefit, prevents competition bidding, and has been held void as against public policy. *Ralphsnyder v. Shaw* (1898) 45 W. Va. 680, 31 S. E. 953. J. T. W.

[NEW SOUTH WALES SUPREME COURT.]

ROBB v. MORRISON and Another.

20 New S. Wales St. R. 163.

Libel and slander — Joint action for slander.

A joint action for slander may be maintained against two or more persons for defamatory words uttered by them at the same time.

— *Evidence of publication — Language overheard by one who does not know parties.*

There is sufficient evidence of publication of a slander where it appears that the defendants, who had formerly employed the plaintiff, missed property after she left and went to see her at the hospital in which she was employed, and that their accusation that she had stolen the property was overheard by a patient in one of the rooms, who did not know the persons speaking or the one accused.

— *Privilege — Accusation of former employee — Presence of one having no interest — Malice.*

An accusation by persons for whom the plaintiff had previously worked and who suspected her of stealing, made by them to the plaintiff in a hospital where she was employed, and which was overheard by a patient in a room, who had no interest in the matter and did not know the persons speaking or the one accused, is *prima facie* privileged, and the question of express malice, involving the questions of honest belief in the accusation and its assertion for the protection of defendant's property, is for the jury.

Toogood v. Spyring (1834) 3 L. J. Exch. N. S. 347, 1 Crompt. M. & R. 181, 149 Eng. Reprint, 1044, 4 Tyrw. 582, 9 Eng. Rul. Cas. 55, followed.

(February 23, 1920.)

NEW trial motion.

This was an action for slander brought by the plaintiff, Rebecca Robb, against Mrs. Margaret Morrison and her sister-in-law, Alice Morrison.

It appeared from the evidence that the plaintiff had been in
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the employ of Margaret Morrison as a domestic servant, and after leaving the defendant's service had entered into the employment of Nurse Southwell, the proprietor of a private hospital. Shortly after the plaintiff left Mrs. Morrison's employ the defendants missed some of their property. They went together to see the plaintiff at Nurse Southwell's, where she was then employed. On the way to the hospital the defendants met the Sergeant of Police and told him that a girl who had been working for them had taken some things when she left. In reply to his suggestion that they should put the matter in the hands of the police, they said they did not wish to do that, as she was only a young girl, and they wanted to get her to [164] bring the things back. The defendants then interviewed the plaintiff at the hospital and accused her of having stolen the missing property. A patient in the hospital—Mrs. MacMillan—who was in bed in one of the rooms, overheard the words used.

Mrs. MacMillan did not know who the parties were who were speaking or whom they were accusing. According to Nurse Southwell's evidence, she was not present when the conversation between the plaintiff and the defendants commenced, and she could not remember what was said. The plaintiff said Nurse Southwell was present.

At the conclusion of the plaintiff's case a nonsuit was moved for on the grounds: (1) That the occasion was privileged, there being no evidence of malice; and (2) that two persons cannot be sued jointly in an action of slander. The Chief Justice, before whom and a jury the case was tried, refused to nonsuit and ruled that the occasion was not privileged. The jury returned a verdict for the plaintiff for 100*l*.

The defendants now moved to set that verdict aside and that a nonsuit or verdict be entered for the defendants or a new trial granted on, *inter alia*, the following grounds: 1. That his Honor was in error in not directing the jury that the alleged slander was under the circumstances privileged. 2. That his Honor was in error in not nonsuiting the plaintiff on the ground that there was no publication of the alleged slander by both defendants.

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Hardwick, for the appellant. There is no sufficient evidence of publication to a third person. The patient, Mrs. McMillan, did not know who the persons were who uttered the slander, and she did not know of whom they were speaking. *Odgers*, 5th ed. at 157; *Sadgrove v. Hole* [1901] 2 K. B. 1, 1 B. R. C. 459, 70 L. J. K. B. N. S. 455, 49 Week. Rep. 473, 84 L. T. N. S. 647, 17 Times L. R. 332. But if there was evidence of publication the occasion was privileged, since there was no evidence of express malice. The occasion was prima facie privileged, and his Honor should have left it to the jury to say whether there was any evidence of express malice. *Toogood v. Spyring* (1834) 3 L. J. Exch. N. S. 347, at 351, 1 Crompt. M. & R. 181, 149 Eng. Reprint, 1044, 4 Tyrw. 582, 9 Eng. Rul. Cas. 55; *Padmore v. Lawrence* (1840) 11 Ad. & El. 380, 113 Eng. Reprint, 460, 3 Perry & D. 209, 9 L. J. Q. B. N. S. 137, 4 Jur. 458; *Collins v. Cooper* (1903) 19 Times L. R. 118; *Stuart v. Bell* [1891] 2 Q. B. 341, 60 L. J. Q. B. N. S. 577, 64 L. T. N. S. 633, 39 Week. Rep. 612.

[165] Further, I submit that two or more persons cannot be sued jointly in an action for slander.

D. S. Edwards, for the respondent. On the last point mentioned I would refer to *Smith v. Streetfield* [1913] 3 K. B. 764, at 768, 82 L. J. K. B. N. S. 1237, 109 L. T. N. S. 173, 29 Times L. R. 707, and Clerk & Lindsell, 4th ed. 569. The question is, Can the jury say on the evidence that there was a joint slander? The two defendants went together and said: "We have come together to demand something you shook from our place."

Then I submit this occasion was not a privileged occasion. The facts in *Toogood v. Spyring* (1834) 3 L. J. Exch. N. S. 347, 1 Crompt. M. & R. 181, 149 Eng. Reprint, 1044, 4 Tyrw. 582, 9 Eng. Rul. Cas. 55, are different. There the defendant spoke to the plaintiff and another employee, and it was held to be prima facie privileged. Here, the slander was uttered where it was likely to be, and in fact was, heard by persons who had no interest in the matter.

Hardwick was not called on in reply.

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Pring, J.: This was an action of slander against two defendants. A point has arisen as to whether two or more persons can be sued jointly in an action of slander. There appears to be very little authority on the point. In *Coryton v. Lithebye* (1670) 2 Wm's Saund. 117, 85 Eng. Reprint, 826, it is said that "one action will not lie against several persons for speaking the same words, as where a man brought an action against two for saying, 'Thou hast stolen plate from Cambridge of J. S., and we do arrest thee of that felony,' and there being a verdict for the plaintiff it was moved in arrest of judgment that the action does not lie against two jointly, because the words of one are not the words of the other, but there ought to have been several actions in like manner, as two persons cannot bring a joint action for words; and so it was resolved by the court, for these several causes can no more produce a joint action than their words and tongues may be said to be one." In Clerk & Lindsell that decision is commented upon thus: "It is sometimes said that a slander cannot be a joint tort, but this, it would seem, only means that two persons who separately publish slanders conveying identical imputations cannot be jointly sued."

It is quite clear that two or more persons can be sued jointly in an action of libel, and I see no reason why they cannot also [166] be guilty of a joint slander just as much as they can be guilty of a joint assault, joint negligence, or any other tort. Probably the reason why so few, if any, actions have been brought for joint slander, is the practical difficulty in the way. Where two persons are defaming another at the same time, it would be very hard in most cases to say whether the defamation by one was the defamation by the other, or whether they were not indulging in separate slanders. That may be the practical difficulty which has prevented actions of this kind from being brought, but in my opinion there is no reason why, if the plaintiff can establish that the slander was a joint one by two persons, he should not bring his action jointly against them just the same as he can bring an action against them jointly in respect of a libel.

Another question was whether there was sufficient publication to a third person. The facts were, shortly, that the plaintiff had been in the employ of one of the defendants. At the time of the
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alleged slander she was in the employ of Nurse Southwell, who kept a private hospital. The two defendants, having missed some of their property, went down to Nurse Southwell's place, interviewed the plaintiff, and accused her of having stolen it. A patient in the hospital—Mrs. McMillan—who was in bed in one of the rooms, overheard the words. So that there was, apparently, evidence of the publication to Mrs. McMillan and the only argument which has been addressed to us in regard to that is this: It is contended on behalf of the defendants that as Mrs. McMillan did not know who the parties were who were speaking, or whom they were accusing, there was no publication to her. I do not think that that argument can avail the defendants, because, as I put it in argument, if one person is uttering defamatory language of another in a public street and passers-by hear it, but do not know who the parties are, according to Mr. Hardwick no action for slander can be maintained. Yet there have been numbers of cases of that kind, and nobody has yet thought of suggesting that, inasmuch as the person who heard the defamatory language did not know at the time who the parties were, there was no publication. On that point, too, I think the defendants must fail.

[167] Another question was whether the occasion on which the alleged slander was uttered was privileged. His Honor at the trial ruled that it was not. Mrs. McMillan had no interest whatever in the matter. Therefore it was contended that there could be no privilege, and his Honor so held.

In *T'ooGOOD v. Spyring* (1834) 3 L. J. Exch. N. S. 347 (which was not cited to his Honor) the headnote reads as follows: "A statement of the misconduct of a workman made to his master or employer by the person upon whose premises and for whom he has been at work, if made immediately, *bona fide*, and without any malicious intention, is a privileged communication. So, also, is an honest and *bona fide* complaint made to the workman himself, though in the presence of a third person." There the third person had no interest in the matter. The court reserved judgment, which was delivered by Parke, B. What he says in the course of his judgment applies, I think, to this case. At p. 351 he says: "In general an action lies for the malicious
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publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander); and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defense depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."

That passage in the judgment of *Toogood v. Spyring* has been quoted over and over again. It is, indeed, a classic statement of the law of privilege. In *Stuart v. Bell* ([1891] 2 Q. B. p. 341, 60 L. J. Q. B. N. S. 577, 64 L. T. N. S. 633, 39 Week. Rep. 612), Lord Lindley referred to it in this way: "This passage has been frequently quoted, and always with approval."

Toogood v. Spyring appears to me to be a direct authority in this case, because there is not only the principle laid down in the judgment, but there was the fact that the defamatory words were spoken by the defendant to the plaintiff in the presence of a person who had no interest in the matter. That [168] is exactly what took place here. Mrs. McMillan had no interest in the matter. According to *Toogood v. Spyring*, therefore, the occasion was *prima facie* privileged, and the judge should have told the jury to consider whether there was express malice. That would involve certain questions: Did the defendants honestly believe in the accusation? Did they make it in the assertion of their own rights or for the protection of their own property? Or was it made with some crooked motive or with intention to injure the plaintiff? If they found against the defendant with regard to any of those matters, then the privilege would be gone, and the plaintiff would be entitled to a verdict. These questions, however, were not left to the jury, because the judge ruled that the occasion was not privileged, and they therefore became immaterial.

It appears to me, on the authority of *Toogood v. Spyring*, that
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his Honor was in error in so ruling, and consequently there must be a new trial. The plaintiff must pay the costs of this motion, and the costs of the first trial will be costs in the cause.

Gordon and Ferguson, JJ., concurred.

Verdict set aside. New trial granted. Plaintiff to pay costs of this motion. Costs of the first trial costs in the cause.

Attorneys for the appellants: *Weaver & Allworth. Agents for Ryan & Son (Kiama).*

Attorney for the respondent: *E. R. Abigail.*

Note.—Libel and slander: right to sue two or more persons jointly for slander.

This note is confined to cases where it was sought to recover jointly against two or more persons, all of whom were alleged to have committed a slander. It does not include cases passing on the question whether a joint action can be maintained against a husband and wife for a slander committed by one alone, or whether a joint action can be maintained against a partnership and a member, or a corporation and an employee, or a master and servant for a slander committed by an individual partner, an employee of a corporation, or a servant, in which cases the question was as to the authority, or agency, of the one committing the slander, to bind the other party sought to be held. The note is also confined to civil cases.

It will be observed that in the reported case (*ROBB v. MORRISON, ante*, 298) it was held that a joint action might be maintained against two persons for slander, the court suggesting, as a reason for the fewness of the cases on the question, the difficulty of establishing that the slander was a joint one by two persons.

And in *Bulls v. Long* (1902) 94 Mo. App. 687, 68 S. W. 754, where an action was brought against several for slander of title, the court stated that it did not appear whether each defendant made the statements complained of simultaneously, or at about the same time, but that it was not necessary that this should appear, since slander might be committed by two persons jointly.

It has, however, long been held, in the absence of a conspiracy or common agreement to utter slanderous words, that a joint action could not be maintained against two persons charged with having spoken certain slanderous words, since the words of one were not the words of the other.

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ALABAMA.—*Smith Bros. v. Agee* (1912) 178 Ala. 627, 59 So. 647, Ann. Cas. 1915B, 129.

IOWA.—*Yocum v. Husted* (1918) 185 Iowa, 119, 187 N. W. 663; *Overstreet v. New Nonpareil Co.* (1918) 184 Iowa, 485, 167 N. W. 669; *Frybarger v. Boget* (1918) 184 Iowa, 788, 169 N. W. 139.

KENTUCKY.—*Webb v. Cecil* (1848) 9 B. Mon. 198, 48 Am. Dec. 423.

NEW YORK.—*Thomas v. Rumsey* (1810) 6 Johns. 26.

OHIO.—*Campbell v. Burns* (1896) 7 Ohio N. P. 201.

SOUTH DAKOTA.—*Bebout v. Pense* (1913) 31 S. D. 619, 141 N. W. 515.

WEST VIRGINIA.—*Porter v. Mack* (1901) 50 W. Va. 581, 40 S. E. 459.

ENGLAND.—*Chamberlain v. White* (1622) Cro. Jac. 647, 79 Eng. Reprint, 558; *Chamberlaine v. Willmore* (1622) Palmer, 313, 81 Eng. Reprint, 1099; *Corylton v. Lithebye* (1670) 2 Wm's Saund. 117, 85 Eng. Reprint, 823.

CANADA.—*Messervey v. Simpson* (1912) 22 Manitoba L. R. 421, 1 D. L. R. 532; *Carrier v. Garrant* (1873) 23 U. C. C. P. 276.

In *Webb v. Cecil*, *supra*, the court said: "The tort complained of is verbal slander, and nothing more, for which it seems a joint action against two cannot be maintained. For a libel signed and published to a joint action, it has been held, may be supported, and upon the ground that it is an entire offense, and one joint act done by them both. But such an action cannot be maintained against two for slanderous words, because the words of one are not the words of the other. The act of each constitutes an entire and distinct offense. And a farther reason may be suggested that the same words spoken by one may occasion much greater injury than spoken by another, and that each should only be responsible for the injury inflicted by his own independent act."

And applying this rule it has been generally held that a joint action for slanderous words spoken by both a husband and wife could not be maintained against them. *Baker v. Young* (1867) 44 Ill. 42, 92 Am. Dec. 149; *Malone v. Stilwell* (1863) 15 Abb. Pr. 421; *Anderson v. Pack* (1879) 4 Ohio Dec. Reprint, 495; *Carrill v. Cochran* (1852) 1 Phila. 399; *Blake v. Smith* (1896) 19 R. I. 476, 34 Atl. 995; *Penters v. England* (1821) 12 S. C. L. (1 M'Cord) 14.

The court in *Anderson v. Pack* (1879) 4 Ohio Dec. Reprint, 495, *supra*, said: "The language of the petition is, 'The defendants spoke of and concerning —.' Can such a thing take place? Observation would teach a man that two mouths cannot utter the same words with the same voice. Speech is but sound, a mere vibration of the atmosphere, cognizable only by the auditory sense. From its nature it necessarily follows that the same sound cannot be repeated; a similar

or a like sound may be produced, undistinguishable in every respect from the first and of the like character and signification, but that will not be the same sound. One who repeats a word previously spoken does not utter the identical word, but a similar or like word; he repeats a like sound of the same signification as the first. The two sounds are separate and distinct, although each has the same meaning. Hence each publication of oral language is a new, distinct, and separate publication; and while a man and wife are one, in some respects, they do not speak with one voice, but each for him or her self."

And in *Duquesne Distributing Co. v. Greenbaum* (1909) 135 Ky. 182, 24 L.R.A.(N.S.) 955, 121 S. W. 1026, 21 Ann. Cas. 481, where the question was whether a partnership could be sued for slander, a question not covered by this note, the court said: "All the authorities are agreed that slander, which is an oral utterance of defamatory matter, must necessarily be committed by an individual. Two or more persons cannot, in the very nature of things, jointly utter the same words. Each must and does speak for himself, and each is liable for his own language. A dozen persons might repeat identically the same slanderous words at one and the same time or at different times, and each would be liable in an action against the individual; but two or more of them could not be jointly sued."

And in *Gilbert v. Crystal Fountain Lodge* (1887) 80 Ga. 284, 12 Am. St. Rep. 255, 4 S. E. 905, which was an action by a member of a partnership against the firm, the court stated that it was an old rule that there could be no joint action against several persons for slander, and said: "The courts considered that if two uttered the same words simultaneously, the vocal act of each would have a separate identity, and be an individual act; and so actions for such torts ought to be several, and not joint. It seems there was finally a sort of judicial acquiescence in the theory that a slanderous song, chanted in concert by a number of voices, would lay the foundation for a joint action against all the musicians; and this appears to be as far as decisions have gone, save where the 'new orders' could be cited."

In some cases where the slanderous words were uttered in pursuance of a conspiracy or common purpose, it has been held that a joint action might be maintained.

Thus, in *Green v. Davies* (1905) 182 N. Y. 499, 75 N. E. 536, 3 Ann. Cas. 310, it was held that, where two slanders are uttered in pursuance of a common agreement between two or more, each is jointly liable with the other for their utterances, and that separate causes of action for slander might be joined in the same complaint under § 484 of the Code. The court said; "As to the second objection to the complaint, that an action for slander can be maintained against one person only, we are of opinion that it is not well founded.

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There is no decision in this state on the point, and though *dicta* are to be found in the old textbooks and in some of the English cases which support the appellant's contention, the opinion of modern writers is against it. Odgers, Libel & Slander, p. 370. It is difficult to see on principle why there should be any such rule. The reason given by the old authorities, that a slander can be the utterance of but a single tongue, is not conclusive. Granting that only one person can speak the slander, still other persons may hire or procure him to utter it. In the case of other torts such persons and the actual perpetrator of the act are joint tort-feasors. Thus, a principal and agent may be jointly sued for the negligence of the latter. *Phelps v. Wait* (1864) 30 N. Y. 78. There is no reason for any different rule in a slander case. We do not mean to suggest that the repetition by one person of a slander uttered by another is any part of the original slander. On the contrary, they give rise to two distinct causes of action. But if the two slanders were uttered in pursuance of a common agreement between the parties that such slander should be uttered, then each is jointly liable with the other for their utterance, and separate causes of action for slander may be joined in the same complaint under § 484 of the Code."

And in relying on the decision in *Green v. Davies, supra*, in *Di Blasi v. Artale* (1909) 133 App. Div. 153, 117 N. Y. Supp. 238, a demurrer was overruled to a complaint alleging that the two defendants, and each of them, in the presence and hearing of a designated person, maliciously spoke certain defamatory words, the court stating that although there was no specific allegation of conspiracy the plaintiff might prove under the complaint that the words complained of were uttered in pursuance of a common agreement.

And in an early New York case, *Forsyth v. Edmiston* (1856) 5 Duer, 653, 2 Abb. Pr. 430, the court stated that as a general rule an action of slander will not lie against two, but that whether, where the slander is alleged to have been uttered in pursuance of a conspiracy between the defendants, a count to that effect would be good, was unnecessary to decide, but that it was inclined to the opinion that such a count would be good.

And in *Chesebro v. Powers* (1889) 78 Mich. 472, 44 N. W. 290, where slander of title was charged against several by making and recording a certain instrument, the court said: "While it is true that two or more persons cannot, as a general rule, be held jointly liable for a verbal slander, yet, under circumstances where all are jointly concerned and interested and participate in the general purpose, the concert and co-operation may be shown, although the false and malicious statements may have been made by one alone."

But in *Glass v. Stewart* (1823) 10 Serg. & R. 222, where the complaint alleged that two persons uttered certain identical slanderous

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words by a conspiracy between them, it was held not to state an action for conspiracy, but a joint action for slander, and it was held that such an action could not be maintained. J. T. W.

[HOUSE OF LORDS.]

GLASGOW COAL COMPANY, LIMITED, *Appellants*,
and
WELSH, *Respondent*.

[1916] 2 A. C. 1.

Also Reported in 85 L. J. P. C. N. S. 130, 114 L. T. N. S. 809, 32 Times L. R. 359, 60 Sol. Jo. 336, 9 B. W. C. C. 371, [1916] S. C. 141, 53 Scot. L. R. 311, [1916] W. C. & Ins. Rep. 79.

Workmen's compensation — Accident — Miner bailing water — Rheumatism caused by exceptional exposure to cold and damp.

An injury to one employed as a brusher in a mine, who was directed to bail out water accumulated at the bottom of a pit owing to the breaking down of a pump five days before, and who contracted subacute rheumatism as a result of having to stand up to his chest in water for eight hours in bailing out the pit, was sustained by accident within the meaning of the Workmen's Compensation Act, such injury being an unlooked-for and unexpected effect produced by the exceptional exposure.

Proximate cause — Breakdown of pump five days before as cause of injury resulting from bailing out pit.

The breaking down of a pump which caused the flooding of a mine pit was not the proximate cause of an injury sustained by an employee five days later as a result of his bailing out the pit.

Decision of the Second Division of the Court of Session in Scotland [1915] S. C. 1020, affirmed.

(March 6, 1916.)

Present: Viscount Haldane, Lord Kinnear, Lord Shaw of Dunfermline, Lord Parmoor, and Lord Wrenbury.

[2] APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland upon a case stated by the sheriff-substitute of Lanarkshire under the Workmen's Compensation Act 1906.

The material facts found by the case were as follows:—

On October 23, 1914, the respondent was working on the appeal-
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lants' employment as a brusher at their Newton pit, Kenmuir-hill Colliery, and on that date the water pump in the colliery broke down and a large quantity of water accumulated in the pit bottom, in consequence of which work in the pit was suspended. On October 28, 1914, at about 10 P. M. the respondent was directed to go down the pit, and went down in the belief that he was going to do his ordinary work as a brusher. When he got down the pit he was directed to bail the water therefrom. In order to do so it was necessary for the respondent to stand up to his chest, and he did stand up to his chest, in water; and he was engaged in this work for eight hours. The respondent thereafter, and for two or three days, felt great stiffness and cold and pains in his joints, but continued to work until the morning of November 2, 1914, when he started to go to his work, but had to turn back owing to his physical condition. On November 3 he consulted a doctor, and was found by him to be suffering from sub-acute rheumatism and unfit for work. He continued in this condition from November 2, 1914, until January 25, 1915. From January 26 until March 2, 1915, he was able to work at reduced wages, and since March 2, 1915, his incapacity for work had ceased. The rheumatism from which the respondent suffered was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question.

The sheriff-substitute found in law that this was an injury caused [3] by accident arising out of and in the course of the respondent's employment with the appellants, and awarded him compensation.

The question of law for the opinion of the court was, Was there evidence upon which it could be competently found that the incapacity of the respondent was attributable to accident arising out of and in the course of his employment with the appellants?

The Second Division (the Lord Justice-Clerk, Lord Johnston, and Lord Guthrie) answered this question in the affirmative and affirmed the determination of the sheriff-substitute.

Hon. William Watson, K.C. (of the Scottish Bar); and
Colin Smith (for Harold W. Beveridge, serving with his
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Majesty's forces), for the appellants. The appellants admit that the injuries sustained by the respondent arose out of and in the course of his employment, but they contend that the facts disclosed by the arbitrator cannot be reasonably held to be an accident within the meaning of the act. To constitute an accident there must be an untoward or unlooked-for event, whether external or subjective, which can be referred to as the cause of the injury. In every one of the authorities there is to be found some definite occurrence to which the injury is attributable. *Stewart v. Wilsons & Clyde Coal Co.* (1902) 5 F. 120, 40 Scot. L. R. 81, 10 Scot. L. T. 366; *Fenton v. J. Thorley & Co.* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, 5 W. C. C. 1; *Broderick v. London County Council* [1908] 2 K. B. 807, 77 L. J. K. B. N. S. 1127, 99 L. T. N. S. 569, 24 Times L. R. 822, 15 Ann. Cas. 885; *Brintons v. Turvey* [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 7 W. C. C. 1, 2 Ann. Cas. 137; *Steel v. Cammell, Laird & Co.* [1905] 2 K. B. 232, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142; *Ismay, Imrie & Co. v. Williamson* [1908] A. C. 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713; *Coe v. Fife Coal Co.* [1909] S. C. 393, 397, 46 Scot. L. R. 328; *Sheerin v. Clayton & Co.* [1910] 2 Ir. R. 105, 44 Ir. L. T. 23, 3 B. W. C. C. 583; *Yates v. South Kirkby, &c., Collieries* [1910] 2 K. B. 538, 79 L. J. K. B. N. S. 1055, 103 L. T. N. S. 170, 26 Times L. R. 596, 3 B. W. C. C. 418, 3 N. C. C. A. 225; *Eke v. Hart-Dyke* [1910] 2 K. B. 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482, 3 N. C. C. A. 230; *Clover, Clayton & Co. v. Hughes* [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885; *M'Millan v. Singer Sewing Machine Co.* [1913] S. C. 346, 50 Scot. L. R. 220, [1912] 2 Scot. L. T. 484; *M'Luckie v. John Watson, Ltd.* [1913] S. C. 975, 50 Scot. L. R. 770, 6 B. W. C. C. 850.

[Lord Shaw of Dunfermline referred to *Trim Joint District School Board of Management v. Kelly* [1914] A. C. 667, 83 10 B. R. C.

L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 7 B. W. C. C. 274, 48 Ir. L. T. 141, [1914] W. C. & Ins. Rep. 359, Ann. Cas. 1915A, 104].

The cases of *Alloa Coal Co. v. Drylie* [1913] S. C. 549, 50 Scot. L. R. 350, 6 B. W. C. C. 398, [1913] W. C. & Ins. Rep. 213, 1 Scot. L. T. 167, 4 N. C. C. A. 899, and *Coyle v. John [4] Watson, Ltd.* [1915] A. C. 1, [1914] W. N. 195, 83 L. J. P. C. N. S. 307, 111 L. T. N. S. 347, 30 Times L. R. 501, 58 Sol. Jo. 533, 7 B. W. C. C. 259, [1914] S. C. 44, 51 Scot. L. R. 492, which are most like the present, are distinguishable, because it was the accident that drove the man in the one case into the water, and in the other into the cold draft of air. Here it is the man's own choice that he went into the water. It may be said that the finding of the arbitrator meant that the extreme and exceptional exposure to damp and cold was the accident; but he does not say so, and that is not the fair construction of the words. Here the only accident occurred on October 23, and there is nothing to connect the injury with that.

A. H. B. Constable, K.C., and D. Oswald Dykes (both of the Scottish Bar), for the respondent, were not called upon.

The House took time for consideration.

Viscount Haldane: My Lords, I do not think that the question raised by this appeal is really a difficult one. The sheriff-substitute has found that the rheumatism from which the respondent suffered "was caused by the extreme and exceptional exposure to cold and damp to which he was subjected" by complying with the direction given to him on October 28, 1914, to bail the water out of the pit, a direction which necessitated his entering the water and standing in it up to his chest for eight hours. In order to make out his claim under the Workmen's Compensation Act 1906, a workman must prove that there was "personal injury by accident arising out of and in the course of the employment." The finding of the arbitrator, who was in this case the sheriff-substitute, is made conclusive as to whether he has done so, unless there was on the face of the award error in law, or unless there was no evidence to support it. In the present appeal

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it is clear that it must be taken that the arbitrator found conclusively that there was injury due to an event arising out of and in the course of the employment. The one question is whether, reading the award as a whole, this event could be in point of law an accident within the meaning of the act, for if so the arbitrator certainly had before him evidence on which he could find that it had happened.

On the question so remaining I think that the judgment in this [5] House in *Fenton v. J. Thorley & Co.* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, 5 W. C. C. 1, is conclusive. If the definition of accident within the meaning of the act is "an unlooked-for mishap or an untoward event which is not expected or designed," as stated by Lord Macnaghten, it covers the present case. If a qualification is added, as was proposed by Lord Robertson, to the effect that such mishap must arise from miscalculation of forces or inadvertence to them, I think the definition so qualified will still cover the case. For I interpret the finding of facts as amounting to this,—that there was an entry into the cold water and prolonged exposure to it, the effects of which, being miscalculated, proved unexpectedly injurious. There is no suggestion of serious and wilful misconduct on the part of the workman which might, under § 1, subs. 2 (c), of the act, deprive him of the right to compensation. Indeed, it is plain that he went into the water to bail it out of the pit under directions from his employer, and he does not appear to have entertained such apprehensions of danger to himself as to induce him to disobey those directions. Had he died suddenly while so exposed, say of heart disease caused by the shock, there can be no doubt that this would have given a title to his dependents to claim on the footing of injury from accident. I am unable to see why a claim in respect of a less serious mishap should be excluded by the circumstance that the miscalculated action of entering the water took time to produce its consequences. This miscalculated action of entering the water in the present case must be taken to have constituted a definite event which culminated in rheumatic affection. It was the miscalculation which imported into that event the character of an accident within the meaning of the act.

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For these reasons I have come to the conclusion that the appeal ought to be dismissed, with costs, and I move accordingly.

Lord Kinnear: My Lords, I agree with the noble and learned Viscount that this appeal must be dismissed. It cannot be disputed that on October 28 the respondent sustained an injury (to wit, a subacute rheumatism) arising out of his employment; and the only question is whether the injury arose by accident in the sense of the statute. I agree with the majority of the judges [6] in the Court of Session that this question is not to be answered by pointing to the breakdown of a water pipe on October 23. It may be that the inception of the disease may be logically traceable to the bursting of the pipe through a series of causes and effects following one another in order. But the connection is too remote to avail for fixing the right to compensation. It is trite doctrine that inasmuch as "it were infinite for the law to judge the causes of causes, it contenteth itself with the immediate cause." I, of course, accept the law laid down in this House in the cases of *Fenton v. J. Thorley & Co.* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, 5 W. C. C. 1, and *Clover, Clayton & Co. v. Hughes* [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885, that the distinction of proximate from remote causes is not to be rigorously pressed in the application of the Workmen's Compensation Act. But the maxim, if it is not to be treated as an inflexible rule, may still be useful as "a guide," to use the language of a distinguished writer, "to the exercise of common sense." And this is quite in accordance with the opinion expressed by noble and learned Lords in the cases I have cited. For what they disapproved of was, in effect, the substitution of logical subtleties for the natural reading of plain facts. Accordingly, in the case of *Fenton* [1903] A. C. 443, 451, where a workman was ruptured while trying to turn a wheel which had stuck fast in consequence of an accidental leak in a part of the machinery, Lord Robertson says: "The plain fact is that he miscalculated or by inadvertence did not compare the relative resisting forces of the wheel and his body. In this state
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of facts I am of opinion that this personal injury arose by accident" in the sense of the statute, and he adds: "I do not rely on the historical circumstance that the sticking of the wheel was caused by an accidental leak. I think myself that the leak is too remote to impart its own accidental character to the injury which ultimately resulted to this man." In like manner Lord Macnaghten, after explaining the accidents which had impeded the working of the wheel, says [1903] A. C. 445: "I mention these circumstances merely for the purpose of putting them aside. It was, indeed, argued by the learned counsel for the appellant that, if the mishap that befell Fenton was not of itself and apart from all other circumstances an accident within the meaning of that word as used in [7] the act, then these two things—the loss of a spoke in the wheel and the leak in the kettle—introduced an element of accident—a fortuitous element it was called—which would satisfy the terms of the enactment, however narrowly it may be construed. In my opinion, they do not affect the question in the least."

I conceive that this decision, both on its negative and its affirmative side, is directly in point. On the other hand, in the case of *Coyle v. John Watson, Ltd.* [1915] A. C. 1, [1914] W. N. 195, 83 L. J. P. C. N. S. 307, 111 L. T. N. S. 347, 30 Times L. R. 501, 58 Sol. Jo. 533, 7 B. W. C. C. 259, [1914] S. C. 44, 51 Scot. L. R. 492, it was held that the antecedent wreckage of a mine shaft was not too remote to be taken into account in determining the accidental character of the consequent exposure of a workman to a cold draft, whereby he contracted pneumonia. But this is in no way inconsistent with *Fenton's Case* [1903] A. C. 443, because the facts were altogether different. It was held in the later case that the incidents were directly connected and could not be treated as independent and detached factors. In this particular the present case is, in my judgment, distinguishable from *Coyle*, and not distinguishable from *Fenton*.

If the breakage of the pump must, therefore, be treated as an historical incident, and not as a direct cause of injury, we have still to look for the true determining fact on which the case depends. And I think the ninth finding of the stated case leaves no room for doubt upon this matter. I observe that the learned
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sheriff-substitute distinguishes with precision between his findings in fact, which are final, and the decision which he bases on the facts so found, and which admittedly involves matter of law. The finding which I take to be conclusive is "that the rheumatism from which the respondent suffered was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question." I agree with my noble and learned friend that the sheriff-substitute cannot be said to have misconstrued the statute when he found, farther, that "this was an injury by accident arising out of and in the course of his employment." On the particular occasion described the man exposed himself, in performance of his duty to his employer, to an extreme and exceptional degree of cold and damp, the character and effects of which he had miscalculated or through inadvertence had failed to foresee. If the sheriff-substitute thought that this was an untoward and [8] unlooked-for mishap which was not expected or designed, I see no ground in law for disturbing his decision.

The learned counsel for the appellants argued that in order to satisfy the act there must be some distinct event or occurrence which, taken by itself, can be recognized as an accident, and then that the injury must be shown to have followed as a consequence from that specific event. But this is just the argument that was rejected in *Fenton v. J. Thorley & Co. supra*. It is unnecessary to say more; but I venture to add that the argument seems to me to rest upon a misreading of the statute, which can only have arisen from a failure to give any exact attention to the actual words. The statute does not speak of an accident as a separate and distinct thing to be considered apart from its consequences, but the words "by accident" are introduced, as Lord Macnaghten says; parenthetically, to qualify the word "injury." The question, therefore, is whether the injury can properly, and according to the ordinary use of language, be called accidental. Another point which has been strenuously maintained in various cases could hardly have been stated were it not for the same deviation from the exact words of the statute. It is said that a disease is not an accident and is therefore excluded from the scope of the enactment. This seems to be suggested by an ambiguity in the use of

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the word "accident," which may either denote a cause or an effect; and the argument, assuming the latter meaning to be intended, is that no injury can be called accidental unless it be a visible hurt to the body, apparently caused by some external force. But there is no support for this notion to be found in the statute. For the statutory form of words gets rid of the double meaning completely. It is impossible to read the words "by accident," in the connection in which they occur, as denoting only the apparent character of the harm sustained and not the cause or source from which it may have arisen. The conclusive answer, however, is that in the case of *Drylie* [1913] S. C. 549, 50 Scot. L. R. 350, 6 B. W. C. C. 398, [1913] W. C. & Ins. Rep. 213, 1 Scot. L. T. 167, 4 N. C. C. A. 899, where the argument was maintained with great force by Lord Salvesen, it was distinctly rejected by the decision of the court, which was approved by this House in the case of *Coyle v. John Watson, Ltd. supra*. This was in accordance with previous [9] decisions of the House; and I apprehend it must now be taken as settled that while a disease is not in itself an accident it may be incurred by accident, and that that is enough to satisfy the statute. On this point, indeed, the statute is its own interpreter. For the section which enables certain industrial diseases to be treated as accidents, although in fact they are not accidental, provides that this is not to affect the right of a workman to recover compensation in respect of a disease to which the section does not apply, "if the disease is a personal injury by accident in the sense of the act."

I desire to add that I do not participate in the difficulties which Lord Johnston seems to have experienced in reconciling his opinion in the present case with the decisions in *Eke v. Hart-Dyke* [1910] 2 K. B. 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482, 3 N. C. C. A. 230, and *Steel v. Cammell, Laird & Co.* [1905] 2 K. B. 232, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142, and with the statutory conditions as to the notice of accident which must be given to the employer. These decisions are based on the undisputed principle that disease unconnected with accident is not within the scope of the enactment; and as regards the facts it was held that a disease

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contracted gradually from continuous exposure to sewer gas, but which could not be related to any particular time or to any unforeseen and undesigned event as the origin of the mischief, could not properly be described as the result of accident. Whether this was right or wrong as an inference of fact it is unnecessary to inquire. But nothing could be further from collision with the principle on which the present case must be decided. I do not doubt that accident must mean something of which notice can be given. But the stated case sets out a perfectly definite event at a definite time and place, and there could be no difficulty whatever in complying with the condition for notice. What may have been the best form of notice in the present case it is not for us to consider, because we know nothing about the notice actually given, except that no objection has been taken to it, and we must assume that it satisfied the statute.

Lord Shaw of Dunfermline: My Lords, the stated case narrates that the respondent was a brusher employed by the appellants in a coal mine. On October 28, 1914, on going down [10] the pit, he was directed to enter a body of water, which had been accumulating owing to the breakdown of a water pump five days before, and to bail out the water. He was required to stand up to his chest in the cold water, and this he did for eight hours. He contracted subacute rheumatism. The sheriff finds "that the rheumatism was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question."

I do not see how it can be argued that this finding was not one of fact; nor do I see how, that being so, it did not justify the finding in law that the words of the statute were affirmed, namely, that the appellant sustained "an injury by accident arising out of and in the course of his employment."

Injury by accident is a composite expression. It includes a case like the present, namely, the contraction of disease, arising from extreme and exceptional exposure. This expression—"contraction of disease"—might also, no doubt, be analytically treated, and it might be said that the disease was the injury and its contraction the accident; but that carries the matter no far-

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ther, and in both cases the composite synthetic expression brings the events together just as they happen in life and in fact. This construction, besides being most simple, prevents the confusion that is apt to arise by the supposed difficulty of applying the act because the event cannot be fixed in date. The disease and its contraction stand together so far as date is concerned; and in this case that date was October 28. The cases of *Drylie* [1913] S. C. 549, 50 Scot. L. R. 350, 6 B. W. C. C. 398, [1913] W. C. & Ins. Rep. 213, 1 Scot. L. T. 167, 4 N. C. C. A. 899, in the Court of Session, and *Coyle* [1915] A. C. 1, [1914] W. N. 195, 83 L. J. P. C. N. S. 307, 111 L. T. N. S. 347, 30 Times L. R. 501, 58 Sol. Jo. 533, 7 B. W. C. C. 259, [1914] S. C. 44, 51 Scot. L. R. 492, in this House, dealt with physical occurrences analogous to that in the present instance, and the same principle as that now given effect to was there applied.

On the wider ground, apart from precedent, I do not doubt that the statute has been correctly applied, and that the appeal should fail.

Lord Parmoor: My Lords, the respondent was a miner who was working in the employment of the appellants as a brusher at their Newton pit, Kenmuirhill Collicry, when on October 23 the water pump broke down and a large quantity of water accumulated [11] in the pit bottom. These facts form part of the history of the case, but I think it is impossible to say that there is any connection between the injury in respect of which the claim is made, and the accident of the breaking down of the water pump which occurred on October 23.

On October 28 the respondent was directed to go down the pit, and was employed to bail water from the pit bottom. It is not denied that in the course of this employment, and arising out of it, he contracted an attack of subacute rheumatism, rendering him unfit to work. The sheriff-substitute has held that it was established as a fact that the rheumatism, from which the respondent suffered, was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question, and found that there was an injury caused by accident, and that the appellants were liable to the respondent in compensation. **10 B. R. C.**

sation. This finding is final, subject to an error in law. It was, however, argued on behalf of the appellants that there was no evidence from which it could competently be found that the incapacity of the respondent was attributable to an injury by accident. The Court of Session affirmed the determination of the sheriff-substitute, and it is against this decision that the appeal is brought.

My Lords, I cannot doubt that there was evidence from which the sheriff-substitute could competently find that the incapacity of the respondent was attributable to an injury by accident, using the word "accident" in its ordinary natural sense. The immersion in water, under conditions of extreme and exceptional exposure to cold and damp, may be regarded either as an unforeseen, or an untoward, event, and in either alternative as an accident. This being so, it was within the competency of the sheriff-substitute to find in favor of the respondent. The miscalculation of conditions, or carelessness as to conditions, is a common cause of accident, as in the case of a person being accidentally drowned through miscalculation of the depth of the water into which he has entered, or through carelessness in making no calculation as to its depth. There is no error in law, and this ends the case.

The decision of the Court of Session should be affirmed, and the appeal dismissed with costs.

[12] **Lord Wrenbury:** My Lords, in this case the workman sustained "personal injury" in the form of a physical ailment or illness, namely, subacute rheumatism. For the purpose of the construction of the act, it must be immaterial whether the "personal injury" is death, or the loss of a limb, or disease, or illness. In each case the personal injury is not, and cannot be, the accident. It is the result of the accident. The phrase in the act is "personal injury by accident." In this and in every case the inquiry must be whether the personal injury which has been sustained was sustained in such a state of circumstances as that it was sustained "by accident." I call particular attention to the fact that the language of the act is not "personal injury by an accident," but "personal injury by accident." This means, I conceive, personal injury, not by design, but by accident, by some
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mishap unforeseen and unexpected; accidental personal injury.

While, on the one hand, it is true that the personal injury cannot be the accident which satisfies the phrase "by accident," yet, on the other hand, it is at the same time true that the result is a factor which assists in determining whether the injury was sustained by accident or not. If a man undresses on the beach in order to enjoy a bath in the sea, goes voluntarily into the water, and is drowned by reason of the existence of a strong current, no one could deny that his death was accidental, that his death was by accident. In this case his going into the water was not accidental; the existence of the current was not accidental; but there was a factor which caused his death to be "by accident," and that was that unintentionally—perhaps by ignorance—he miscalculated the forces with which he had to do; he did not know of the current, or he thought that he was a strong enough swimmer to cope with it. He was wrong. The mishap which resulted from his bathing in this dangerous place was accidental. He had no intention or thought of going to his death. No other person intervened to conduce to the result. The sufferer's death was an unexpected event, an untoward result; it was by accident. If he had not been drowned it would be accurate to say that happily there had been no accident. That which I endeavor to express is perhaps best summarized by saying that although the "personal injury" (the death, or disease, or whatever it is) cannot be the accident, [13] yet the contraction of the disease or the incurring of the death may be by accident. The fact of disease is not an accident, but the contraction of disease may be by accident. Section 8, subsec. 10, in using the words "if the disease is a personal injury by accident," means, I think, "if the disease is a personal injury incurred by accident."

My Lords, after these general observations I do not feel that any useful purpose will be served by traveling through the numerous cases which have been cited. The question is whether such facts have been found as that the arbitrator could from those facts arrive at the conclusion that the rheumatism was contracted under such circumstances as that the personal injury was by accident. The only finding which I need set out is: "9. That the rheumatism from which the respondent suffered was caused by the ex-
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treme and exceptional exposure to cold and damp, to which he was subjected on the occasion in question." Suppose the events had been that under directions given by the employer the man had gone into the water, and it had proved unexpectedly to be 8 feet deep, and that he had been drowned. No one, I think, would dispute that his death would have been by accident. The accident would have arisen from miscalculation or ignorance as to the depth of the water, by reason of which the man was exposed to danger and was drowned. Is there any difference of principle between the case in which the water went over his head and caused death, and the case in which the water extended as high as his chest and caused rheumatism? I think not. In all these cases it is essential to bear in mind that the appellate judge has not to determine whether he would have arrived at the conclusion at which the arbitrator arrived, but has to see whether such facts are found as that the arbitrator could arrive at that conclusion. Here the sequence of the language in the case, after the finding which I have quoted, shows that the arbitrator's finding is that the rheumatism was an injury caused by the extreme and exceptional exposure to cold and damp; in other words, that the extreme and exceptional exposure to cold and damp was that which caused the personal injury to be by accident. I take this to mean that neither employer nor man anticipated that the cold and damp would have been so extreme as to cause the illness; that the exposure of the man to it was an untoward event; that [14] the result was unexpected; that the outcome was a mishap; and that consequently the injury was by accident. Whether I should have been of that opinion or not, I think the arbitrator could properly so hold.

I may add that the events of October 23 have, in my judgment, no bearing upon the matter. There was an accident on October 23, no doubt, but that accident caused nothing in the events of October 28. Suppose there is a railway accident by collision, and that a breakdown gang is sent to deal with the matter, and that a member of the breakdown gang is injured when dealing with it. The fact that he is sent to deal with the results of an accident by collision does not show that he suffered from the accident by collision. The fact that there was such an accident has no bearing

upon the question whether he was injured by accident or not. So here the fact that the water would not have been there if the pump had not accidentally broken down on October 23 has no relevance to the question whether on October 28 the man was the victim of an accident.

The conclusion at which I arrive is that upon the facts found the arbitrator could hold as matter of law that the injury was by accident. The appellant, I notice, by his supplementary statement, submits that the question is whether "it could competently be held by the arbitrator that the respondent's incapacity was attributable to an accident." By this divergence from the words of the act the appellant has, I think, fallen into an error which taints all the subsequent submissions in his case. In the next sentence he alters the language which he uses and adopts the language of the act, but seemingly he fails to notice that he has done so.

In my judgment the appeal fails and must be dismissed.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, March 6, 1916.

Agents for appellants: *Beveridge, Greig, & Company*, for *W. T. Craig, Solicitor, Glasgow*, and *W. & J. Burness, W. S., Edinburgh*.

Agents for respondent: *Sewell, Edwards, & Nevill*, for *O'Hare, Lyons & Company, Writers, Glasgow*, and *J. Douglas Gardiner & Mill, S.S.C., Edinburgh*.

Note.—**Workmen's Compensation Acts:** Rheumatism of sciatica contracted by workman as an "accident," or "personal injury."

For annotation on chill as "accident" within workmen's compensation acts, see *Maguire v. Union S. S. Co. ante*, 169.

It will be observed that in the reported case (*GLASGOW COAL CO. v. WELSH, ante*, 308) subacute rheumatism, caused by extreme and ex-

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ceptional exposure to cold and damp, to which a brusher in a mine was exposed while standing in a pit up to his chest for eight hours following instructions to bail out the pit, which was flooded by reason of the breaking down of a pump five days before, was held to have been occasioned by accident within the meaning of the Workmen's Compensation Act, providing for compensation in case of personal injury by accident arising out of and in the course of the employment; on the ground that although the breakdown of the pump was too remote to impart its accidental character to the injury, yet, aside from this, his injury, resulting from the exposure, was a mishap unforeseen and unexpected, and therefore an accident.

There is little direct authority on the question here considered.

In *Barbeary v. Chugg* (1915) 8 B. W. C. C. 37, acute sciatica, developed by an unlicensed pilot, was held to have been caused by an accident arising out of his employment, where it appeared that after piloting a ketch out of a harbor on a day in January when a heavy gale was blowing, he jumped into his own boat and alighted in an unsuitable place, so that the nose of the boat went under water and was partly filled, and he was nearly drowned and wetted to the thighs, and was pulled out by the captain of the ketch, and he subsequently got into his boat, baled it out, and rowed home, during the process of which he again got wet from the spray, and sciatica developed as a result of his wetting. Cozens-Hardy, M. R., said: "In getting off from the ketch, which is not a very big vessel, of course, I think the result of the evidence is that he jumped and alighted not in the best or most suitable position, but in the front of the boat, the result being that the boat went under water and became so nearly full that he was up to the thighs in water. The captain who saw this pulled him up again into the ketch, and said that he had had a narrow escape of being drowned. Then he got into the boat again and baled out the water, got free of the ketch, and rowed back to the quay. During that process, although he was wet up to the thighs by the first plunge, he got wet again with the spray. The result was that the doctor found him suffering from sciatica, and the judge awarded him certain sums during total and partial incapacity, and a suspensory payment of 1*d.* a week from that time, because one never could tell whether it would come on again or not. Now was there an accident? I certainly do not intend to affirm that because a pilot merely gets very wet in rough weather and suffers from it, that that is an accident or injury arising out of and in the course of the employment. There must be something distinct from the injury; one cannot disregard the words 'by accident.'"

Coyle v. John Watson [1915] A. C. 1, 30 Times L. R. 501, [1914] W. N. 195, 83 L. J. P. C. N. S. 307, 111 L. T. N. S. 347, 58 Sol. Jo. 533, [1914] S. C. 44, 51 Scot. L. R. 492, 7 B. W. C. C. 259.
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There a miner was kept one and a half hours in water with serious consequences. There was no doubt about the injury, but the fact of his being detained did not entitle him to compensation under the act. The complainant said that something was wrong with one of the shafts by which he usually ascended, and this had imposed on him the obligation of waiting at the other; that the accident which took place was the first shaft being out of order, and that he being obliged to stand in water was the legitimate and natural consequence of that accident. The only accident stated here is that he jumped from the ketch into the boat and made a bad shot, and part of the boat went under water to such an extent that he was in danger of being drowned, and he was pulled up into the ketch. I am not prepared to say that there was not sufficient evidence that there was an accident, and that the injury arising is the consequence."

But it has been held that an employee who contracted sciatic rheumatism while at work in the severe cold, with clothing wet from dripping water, after having been exposed to high temperatures on other days, did not sustain an accident entitling him to compensation under the Nebraska Workmen's Compensation Act. *Blair v. Omaha Ice & Cold Storage Co.* (1917) 102 Neb. 16, 165 N. W. 893. The court said: "Plaintiff insists that the illness was an 'accident' as defined in the Compensation Act, while defendant insists that the disease was contracted in the natural course of events, and was not the result of accident. The statute involved provides: 'Compensation shall be made for personal injuries to or for the death of such employee by accident arising out of and in the course of his employment.' Rev. Stat. 1913, § 3651. 'The word "accident" as used in this article shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury. The terms "injury" and "personal injuries" shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The said terms shall in no case be construed to include occupational disease in any form,' etc. Rev. Stat. 1913, § 3693. Was the sickness of plaintiff an 'accident'? There was no event which happened suddenly and violently which produced at the time objective symptoms of an injury. The statute provides that the terms 'personal injuries' and 'injury' 'shall mean only violence to the physical structure of the body.' There was no violence to the physical structure. . . . In the case at bar no accident has been shown. The case is in no wise different than the ordinary case where a man who has been engaged in indoor work for a time does outdoor work in cold weather and contracts a severe cold. Indeed it may be questioned whether the trouble, according to the evidence of the doctor, was
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not, to some extent at least, occupational, and the statute expressly provides that the terms used therein shall in no case be construed to include occupational disease in any form. This court has already construed very liberally the provisions of the statute, but to hold that plaintiff's sickness was the result of an accident would be, in our opinion, to go beyond any reasonable construction." J. T. W.

[SUPREME COURT OF VICTORIA.]

PASH v. VICTORIAN STEVEDORING & GENERAL CONTRACTING COMPANY PTY. LTD.

[1920] Vict. L. R. 35.

Workmen's compensation — Accident arising out of and in the course of employment — Stevedore's employee descending improper hatchway.

An injury to a stevedore's laborer did not arise out of and in the course of his employment within the meaning of the Workmen's Compensation Act, but was caused by added risk voluntarily and unnecessarily undertaken by him, where, while working at night at a well-lighted hatchway, he returned from the wharf, which he had had occasion to visit, by way of another hatchway which was unlighted and dangerous, and which he had no right to use, and was injured by falling down the hole.

Lancashire and Yorkshire Railway Co. v. Highley [1917] A. C. 352, 86 L. J. K. B. N. S. 715, 116 L. T. N. S. 767, 33 Times L. R. 286, 61 Sol. Jo. 397, 10 B. W. C. C. 241, Ann. Cas. 1917D, 200, 15 N. C. C. A. 210, applied.

(December 3, 1919.)

APPEAL from award of statutory arbitrator.

The appellant, Albert Victor Pash, who was a stevedore's laborer employed by the Victorian Stevedoring & General Contracting Company Pty. Ltd., on 1st August, 1918, sustained personal injury by accident through falling down the hold of the steamship Baramba, which he was engaged in unloading at the Victoria Docks, Melbourne.

Arbitration under the provisions of the Workers' Compensation Act 1915 (No. 2750) was requested, and the case came before his Honor Judge Winneke as arbitrator.

The appellant was engaged on 31st July, 1918, to work in the
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unloading of the steamship *Baramba*, which was then lying at Victoria Docks, Melbourne. Appellant commenced work on the night of 31st July at 7 P. M. Hatches Nos. 5 and 6 were fitted with booby hatches, or covered stairways, leading below to what had been used as troop decks. Appellant was set to work at No. 6 hatch. To get there he went along the main deck to No. 5 hatch, descended by the booby hatch there, and went along to his work at No. 6 hatch, where he worked all night. At 7 P. M. on the evening of 1st August he came on board again, descended by No. 6 hatch, and worked in the hold till about 9 P. M., when he had to visit the wharf, and to do so ascended by No. 6 hatch. On returning [36] he descended by the open booby hatch at No. 5 hatch to the deck immediately below, and proceeded to walk thence along the deck towards No. 6 hold, which was about 27 feet distant. Part of the hatches at No. 6 hatch had been removed, and appellant, not knowing or noticing this, fell down the hold there, and was injured. The spot where appellant fell down was not at the time illuminated by any light at all. On both nights on which appellant was at work No. 6 hatch was brightly illuminated with electric lights, but the effect of these lights did not extend more than 4 feet in the direction of No. 5 hatch, which was quite dark. On the night of 31st July, No. 5 hatch was not worked, and appellant had safely ascended and descended by that hatch. During the daytime of 1st August, No. 5 hatch had been worked, and in the evening, when work was discontinued, only part of the hatch coverings on the troop deck had been replaced. There was evidence that the route taken by the appellant by way of No. 5 hatch was longer than the route by way of No. 6 hatch; also that the practice was for men to proceed direct to the hatch for which they were detailed, and also that they should not enter a hold when in darkness. There was also evidence that other workmen had used No. 5 hatch for ascending and descending on the night of 31st July.

The arbitrator, by his award on 8th September, dismissed the application for compensation.

The applicant then brought this appeal.

Dizon, for the appellant. The appellant was entitled to choose
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his route to his work, both No. 5 and No. 6 latches being available. He had used No. 5 previously without accident. At most he made an error of judgment in choosing the more dangerous of two routes, and that does not prevent the accident arising out of his employment. *Barnes v. Nunnery Colliery Co.* [1912] A. C. 44, 47, 81 L. J. K. B. N. S. 213, 105 L. T. N. S. 961, 28 Times L. R. 135, 56 Sol. Jo. 159, 49 Scot. L. R. 688, 5 B. W. C. C. 195, and cases there cited.

Starke, for the respondent. The court will not disturb the arbitrator's findings of fact where there is evidence to support them. *Brice v. Edward* [1909] 2 K. B. 804, 810, 101 L. T. N. S. 472, 25 Times L. R. 759, 53 Sol. Jo. 744, 2 B. W. C. C. 26. The applicant introduced an added peril by unreasonably going by a dangerous route, where he had no business to be at all. *Lancashire & Yorkshire R. Co. v. Highley* (1917) A. C. 352, 86 L. J. K. B. N. S. 715, 116 L. T. N. S. 767, 33 Times L. R. 286, 61 Sol. Jo. 397, 10 B. W. C. C. 241, Ann. Cas. 1917D, 200, 15 N. C. C. A. 210. [37] He made an unreasonable use of whatever power he had to choose a path to his work.

Dizon, in reply. There is a distinction between operations for the benefit of the master and the use of facilities offered to a worker for his own benefit. The test of reasonableness is confined to the latter class of acts.

Cur. adv. vult.

Hood, J., read the following judgment: In my opinion this appeal should be dismissed, on the ground that the injuries received by the appellant did not arise out of his employment, but were caused by an added risk voluntarily and unnecessarily undertaken by himself. He is an experienced man, who was engaged to work at night in unloading a ship. When he put his foot on the ship there were, according to him, two ways along which he could reach his work. One was well lit; the other, to use his own words, was pitch dark, and he chose the latter. His excuse was that that was the shorter way, but this is not correct in fact. As a man accustomed to the work, he knew the danger of going about the ship in the dark, and still he went. No way was provided for by his contract, nor is there any evidence of usage of 10 B. R. C.

the dark way to the knowledge of the company, or of any of its officials. The learned judge has found that the conduct of the appellant was unreasonable, and I strongly agree. There is no analogy between this case and those where a man is injured through his carelessness in doing the work he was employed to do. That is a risk which the employment naturally includes. This man went into a part of the ship in circumstances which showed that he had no business there; but it was no part of his employment to be there, and he has only himself to blame for the misfortune that befell him. This added peril which he risked was not incurred to further his employer's interest, nor did his injuries arise from any negligence in doing the work he was employed to do. The arbitrator has to ask himself, Was the injury caused by something reasonably incidental to the employment? *Barnes v. Nunnery Colliery Co.* [1912] A. C. 47, 81 L. J. K. B. N. S. 213, 105 L. T. N. S. 961, 28 Times L. R. 135, 56 Sol. Jo. 159, 49 Scot. L. R. 688, 5 B. W. C. C 195,—and there was no evidence here that the using of this dark passage was a reasonable course. The peril which the appellant encountered was not one which can be regarded as a possible incident of his employment, [38] but was one of his own creation by his own action. *Lancashire & Yorkshire R. Co. v. Highley* [1917] A. C. 363, 86 L. J. K. B. N. S. 715, 116 L. T. N. S. 767, 33 Times L. R. 286, 61 Sol. Jo. 397, 10 B. W. C. C. 241, Ann. Cas. 1917D, 200, 15 N. C. C. A. 210.

The appeal will be dismissed, with costs.

Cussen, J., read the following judgment: In arbitration under the Workers' Compensation Act 1915, as in most other cases of arbitration, the decision of the arbitrator as to questions of fact is final. The difference between these cases and some other cases of arbitration is that the judge acting as arbitrator generally states his reasons for his conclusion, and so may be said to make a "speaking award." It follows, therefore, that unless he has gone wrong on some matter of law of which his award speaks, including in matters of law the question whether there is any evidence to support his purported finding of fact, his award cannot be disturbed. In this case I cannot see that the learned judge has gone

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wrong in any matter of law, and I think there was ample evidence to support his finding of fact. The whole case turns upon what was done by the claimant in going from the gangway towards the scene of his actual work. It must be remembered that a ship being unloaded both during the day and night is one in which circumstances and surrounding rapidly vary. I am not prepared to say that the claimant was not impliedly authorized to take any reasonably safe course to his work near the ship's bottom, or that he was bound to go down from the main deck to the troop deck by way of No. 6 hatchway. But in this case it is not necessary to go further than to say that there was evidence to support the judge's finding that he unnecessarily crossed the deck, and took a longer course than the usual one, and descended into a place which was dark and obviously likely to be dangerous. It appears that where a hatch is being worked in the daytime and is intended to be further so worked, it is usual to leave off at night some or all of the hatch coverings on the lower deck. That was the condition of No. 5 hatch on the night of the accident. It was contended that variations in circumstances such as I have mentioned could never affect the question whether an act which at any time was within the course of employment was at other times outside it.

The authorities which I will presently cite will show that this is not universally true, and these authorities are specially applicable to cases where a worker is going to or from work or to or from [39] meals, etc. The case may sometimes be different where the worker is at the scene of his actual work and engaged in it. But, as has often been said, each case must depend on its own circumstances. This case is, I think, governed by the principles laid down in *Lancashire and Yorkshire Railway Co. v. Highley* [1917] A. C. 352, Ann. Cas. 1917D, 200, and the cases cited in it. I refer particularly to two judgments of Farwell, L.J., which are quoted with approval by Lord Atkinson, at pp. 367 and 371, which are entirely consistent with the judgments of the other Law Lords, and which are very apposite in the present case. The first passage is as follows: "All those things that he (*i. e.*, the workman) is entitled to do by virtue of his contract, he is for the purposes of this act employed to do, and they are therefore within
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his contract of employment. I would qualify this by saying that he must make a reasonable use of the facilities and rights which are given to him in this way. . . . It may well be within the terms of the employment to use a track when it is properly and fairly open, but not to use it when it is not." The second passage runs thus: "It is now well settled that the word 'employment' in the act is not to be confined to actual work. In my opinion, it extends to all things which the workman is entitled by the contract of employment expressly or impliedly to do. Thus he is entitled to pass to and from the premises, . . . but he is not entitled, and therefore he is not employed, to do things which are unreasonable or things which are expressly forbidden. . . . In the present case, this place, being a dangerous place, was obviously forbidden to the men, not in the sense of express prohibition, but in the sense that it would not occur to anyone that it would be allowed." The judgments of the other Lords show that they also thought that an unnecessary and unreasonable act done in an obviously dangerous and therefore forbidden place took the act in cases of this class outside the sphere of employment. The judgments show that in such cases unreasonableness with respect to the circumstances existing at the time may have such an effect, and that was what the learned judge here decided. As to the importance of his finding, I may refer to what was said by Lord Finlay, L.C., at p. 359, citing *Baker v. Earl of Bradford* [1916] 9 B. W. C. C. 436, 114 L. T. N. S. 1144, [1916] W. N. 202, 85 L. J. K. B. N. S. 1031, 60 Sol. Jo. 493.

We have had recently to consider a somewhat similar question [40] in *Takle v. Bryant & Shiel Bros.* [1919] Viet. L. R. 656, in which we decided in favor of the claim. But there are several distinctions between that case and the present. First, the finding of the arbitrator was in favor of the claim; and, secondly, we thought that the act of the worker in passing between some trucks was, even in the circumstances there existing, within his discretion. Here the worker never had, in my opinion, a discretion conferred upon him by his employment to enter unnecessarily this dark and dangerous place. In *Takle's Case* the worker was following a practice which the employer must be taken to have impliedly authorized. Here no such practice, either recognized
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or otherwise, was shown, and the onus of proof is on the worker. Finally, in *Takle's Case* the worker at the time of the accident may be said to have been actually engaged in his work, and not merely passing to or from it.

For the reasons I have stated, though I think that no restricted construction should be placed on the words of the act, "arising out of and in the course of his employment," I cannot see my way to disturb the learned judge's conclusion.

Schutt, J.: I agree. In my opinion, the appellant was not in the circumstances entitled to use the route he did use.

Appeal dismissed.

Solicitors for the appellant: *Farlow & Baker.*

Solicitors for the respondent: *Malleon, Stewart, Stawell, & Nankivell.*

Note.—Workmen's compensation: accident to employee while using means of access not authorized by his employer as one arising out of and in the course of his employment.

As to right to compensation where injury results from doing prohibited act, see annotation to *Herbert v. Fox & Co.* 7 B. R. C. 159, and supplemental annotation in connection with *Bourton v. Beauchamp*, *post*, p. —.

It may be stated by way of introduction that the words "arising out of and in the course of the employment" as used in the workmen's compensation acts are generally given a broad and liberal construction by the courts. With respect to the question considered in this annotation no general rules can be laid down. The determination in each case depends upon the facts which are made to appear.

It will be observed that, in the reported case (*PASH v. VICTORIAN STEVEDORING & G. CONTRACTING Co.* *ante*, 325), it was held that the injury to a stevedore's laborer did not arise out of and in the course of his employment where, in returning to his work after having had occasion to go on the wharf, the laborer, instead of returning by the well-lighted hatchway by which he had left, went by another hatchway which was unlighted, and which he was unauthorized to use, and in consequence fell and was injured.

The court here relied upon the decision in *Lancashire & Yorkshire R. Co. v. Highley* [1917] A. C. 352, where a workman employed by a
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railway was held not to have been injured while acting within the scope of his employment, upon its appearing that while waiting at a station, instead of going around by a safe route, he passed under the trucks of a standing train while on his way to the mess room, and was killed by the starting of the train. Lord Sumner said: "My Lords, whether in any given case an accident arises, on the one hand, out of the injured person's employment, although he has conducted himself in it carelessly or improperly, or, on the other hand, arises not out of his employment, but out of the fact that he has gone outside the scope of it, or has added to it some extraneous peril of his own making, or has temporarily suspended it while he pursues some excursus of his own, or has quitted it altogether, are all questions which, often as they arise, are susceptible of different answers by different minds, and are always questions of some nicety. So it is here. I doubt if any universal test can be found. Analogies, not always so close as they seem to be at first sight, are often resorted to, but in the last analysis each case is decided on its own facts. There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or, conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury."

And it has been held that where a bolter up within the hull of a ship left his employment for the purpose of going to his lunch, and went by an unusual route, undertaking to go down a scaffolding and ladder on the outside of the ship, although a perfectly safe method was provided, his injuries sustained by falling were not suffered in the course of, and did not arise out of, his employment. *Moore & S. Iron Works v. Industrial Acci. Commission* (1918) 36 Cal. App. 582, 172 Pac. 1114.

And the accident was held not to have arisen out of and in the course of the employment where a boiler scaler, on a steamship undergoing repairs, registered at the tally office on the way back from dinner, and instead of taking a safe course back, in order to go the shortest way, went under ropes roping off a dangerous area, and was
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injured by a rope breaking while he was watching the repair work. *Murray v. Allan Bros. & Co.* (1913) 6 B. W. C. C. 215.

And in *Hendry v. United Collieries* [1910] S. C. 709, 47 Scot. L. R. 635, [1910] 1 Scot. L. T. 386, 3 B. W. C. C. 567, a finding that the accident did not arise out of the employment was held supported by the evidence where there was testimony that a miner, instead of going the usual way, left work by a steep, rough, short cut, which was occasionally used by some of the men, but there was no evidence that its use had ever been brought to the knowledge of the mine officials.

And in *Dulac v. Dunbarton Woolen Mills* (1921) — Me. —, 112 Atl. 710, it was held that the injury did not arise out of the employment, where the evidence showed that there were several regular avenues of approach and departure from the plant, and that the claimant was injured while attempting to leave by an elevator which employees generally were not accustomed or permitted to use.

Several cases within the scope of this annotation have arisen where an employee pursued an unauthorized way adjacent to or crossing a railroad.

Thus it has been held that an accident did not arise out of the employment where one employed by a railroad as a canal overseer was knocked down and killed by a train while taking a short cut by walking on the railroad in going from a railroad station to the canal office. *M'Laren v. Caledonian R. Co.* [1911] S. C. 1075, 48 Scot. L. R. 885, 5 B. W. C. C. 492. The court stated that there was an available road, and that the workman was not entitled to increase the risk by crossing the railroad.

And in *M'Laren v. Caledonian R. Co. supra*, where a workman in the employ of a railroad took a short cut along the railway line, instead of going around by the road, and was injured, no compensation was held recoverable. The Lord President said: "I think a man who, instead of walking along the public road, which is the natural way to go, chooses to take a short cut for himself along a railway line where the path is so near to the rails that he is liable to be knocked down by a passing engine, does increase the risks, and that if something happens to him in that position the accident is not one which arises out of his employment."

And there was held no evidence to support a finding that the accident arose out of the employment in *Pritchard v. Torkington* [1914] W. C. & Ins. Rep. 271, where a workman, after completing his work in one place, went, on a ticket supplied by his employer, to another at which there were four tracks which he attempted to cross, instead of using a bridge furnished by the railroad, and was killed by an express train.

And in *Ames v. New York Central R. Co.* (1917) 178 App. Div. 324, 165 N. Y. Supp. 84, where a yard engine man turned in his en-

gine and time slip after his day's work, and, instead of leaving for home by available highways, walked along the railroad track for some distance, crossed a street and onto a track on the other side, and was struck and killed by a train, it was held that the accident did not arise out of and in the course of his employment, as he had no authority to be where he was, and was there purely for his own purpose.

And in *Siemientkowski v. Berwind White Coal Min. Co.* (1914) — N. J. L. —, 92 Atl. 909, the court, on certiorari, sustained a finding and holding that the decedent, an employee of a coal mining company, was not in the usual passageway between the tracks of a railroad and the defendant's trestle, but was voluntarily on the tracks of the railroad when struck and killed, and that the accident did not arise out of his employment and that no recovery could be had under the Workmen's Compensation Act.

And where one employed as a stationary engineer by a construction company was injured while going across a railroad bridge having no footpath, to eat his dinner on the other side of the river, the injury was held not to have arisen out of and in the course of his employment, it appearing that he had been instructed not to attempt to cross the bridge, and that his duties were on one side alone. *Nelson R. Constr. Co. v. Industrial Commission* (1919) 286 Ill. 632, 123 N. E. 113.

And it has been held that an injury to a member of a railroad construction gang did not arise out of or in the course of his employment where he was employed by the day and lived in a bunk house belonging to the employer merely for his own convenience, and his injury resulted from being struck by a train while walking, a half hour after quitting time, along the track to the bunk house furnished by his employer, although a safe highway was available. *Guastelo v. Michigan C. R. Co.* (1916) 194 Mich. 382, L.R.A.1917D, 69, 160 N. W. 484.

And in *Benson v. Lancashire & Y. R. Co.* [1904] 1 K. B. 242, 73 L. J. K. B. N. S. 122, 68 J. P. 149, 52 Week. Rep. 243, 89 L. T. N. S. 715, 20 Times L. R. 139, an accident to an engine driver was held not to have arisen out of and in the course of his employment where his work began in the engine shed, which he usually reached by a path which did not cross the railway, but on the particular occasion he went out of his usual way to a signal box for his own purposes, and while on the way to the engine shed was struck by a train.

And in *Guilfoyle v. Fennessy* [1913] W. C. & Ins. Rep. 228, 6 B. W. C. C. 453, it was held that the accident did not arise out of the employment where one employed by a farmer having land on both sides of a river, and keeping a boat for employees to cross in, attempted, at a time when the boat was not available, to swim across instead of going some distance to a bridge, and was drowned.

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And in *Watson v. Sherwood* [1909] 127 L. T. N. S. 86, 2 B. W. C. C. 462, the injury to a club servant was held not to have arisen out of and in the course of his employment where, after having been absent on his own business, he returned late and attempted to gain admission through a window, and in so doing was injured.

And in *Gibson v. Wilson* [1901] 3 F. 661, 38 Scot. L. R. 450, 8 Scot. L. T. 497, an injury to one employed to renovate the interior of a church was held not to have arisen out of and in the course of his employment where it appeared that he found the church locked, and was unable to unlock it, and in order to get to work climbed an iron railing of an adjoining school yard to get in at a window of the church, and received an injury to his foot from a spike in the railing.

And in *United Disposal & Recovery Co. v. Industrial Commission* (1920) 291 Ill. 480, 126 N. E. 183, it was held that employees were not killed in the course of their employment, and that death did not arise out of their employment, where the employer had arranged to take them to work from a certain place by truck, but the truck driver kept the truck in an unauthorized place, and by agreement with the employees carried them by an unauthorized route, and they were killed while crossing a railroad. The court said: "Where an employee chooses to go to a dangerous place where his employment does not necessarily carry him, and where he incurs a danger of his own choosing and one altogether outside any reasonable exercise of his employment, it cannot be said that his act was an incident to his employment. . . . Taylor was instructed to keep the truck in Rockford and had no authority to keep it in Cherry Valley. When he disobeyed instructions and chose to select a route that better suited his convenience he was acting outside his employment, and the injury which he received and which resulted in his death did not arise out of his employment. Peacock and Cramer were not killed in the course of their employment, nor did their death arise out of their employment. There was no agreement by either of plaintiffs in error to furnish them transportation from Cherry Valley to the farm. Without the knowledge of plaintiffs in error they arranged with Taylor to haul them over the Perryville route, and they must be held to have assumed the consequences of their own act. While arrangements had been made for them to ride on the trucks from Rockford to the farm, it was no part of the contract of hire that they would be furnished transportation from their homes to the place of their employment."

In *Peterson v. O'Neil* (1921) — Minn. —, 185 N. W. 948, a workman, a part of whose duties was to gather up lanterns placed on the work as warnings and carry them to the tool house, was held within the protection of the Compensation Act giving compensation for injuries caused by an accident arising out of and in the course of
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the employment, but providing that it did not cover workmen except while engaged on or about the premises where the services are to be performed, or where their services require their presence as a part of such service at the time of the injury, it appearing that he was struck by an engine while on his way to the tool house with the lanterns, although he did not follow the public street, but took a generally traveled and shorter route along the highway.

And in *M'Kee v. Great Northern R. Co.* (1908) 42 Ir. L. T. 132, 1 B. W. C. C. 165, there was held evidence to support a finding that the accident arose out of the employment where it appeared that a workman on a railway was killed on its premises while leaving work by a short cut which, although forbidden, was generally used by employees.

And in *Robertson v. Allan Bros. & Co.* [1908] 98 L. T. N. S. 821, 1 B. W. C. C. 172, there was held evidence that the accident arose out of and in the course of the employment where a steward, after having been on shore leave, attempted late in the evening to board his ship by the cargo skid, which the crew habitually used although there was a gangway, and fell and was injured.

And in *McNicholas v. Dawson & Son* [1899] 1 Q. B. 773, 68 L. J. Q. B. N. S. 470, 47 Week. Rep. 500, 80 L. T. N. S. 317, 15 Times L. R. 242, it was held that the accident arose out of and in the course of the employment where one employed to attend an engine in a shed and also a mortar pan outside the shed was caught in a shaft as a result of his entering the shed by a door that he had been forbidden to use.

And in *Sanderson v. Henry Wright* [1914] 110 L. T. N. S. 517, 30 Times L. R. 279, [1914] W. C. & Ins. Rep. 177, 7 B. W. C. C. 141. the accident was held to have arisen out of and in the course of the employment where a workman employed to inspect scrap iron consigned to his employers at railroad stations was, in the course of his duty, returning from an inspection to the warehouse, and was killed while attempting, contrary to rules, to cross the lines of the railroad while shunting was going on.

And in *Takle v. Bryant & Shield* [1919] Vict. L. R. 656, the injury to a lorry driver was held to have arisen out of and in the course of his employment where he passed between two trucks in crossing the railway and was killed by the sudden moving of the trucks, although a by-law of the railway commissioners forbade crossing at the place in question, which was nevertheless commonly used in preference to a more circuitous route over a bridge.

And in *Sneddon v. Greenfield Coal & Brick Co.* [1910] S. C. 362, 47 Scot. L. R. 337, 3 B. W. C. C. 557, where a workman in a mine lost his way and proceeded along a dangerous road and was injured, it was held that the injury arose out of the employment. J. T. W.
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[ENGLISH COURT OF CRIMINAL APPEAL.]

THE KING v. BASKERVILLE.

[1916] 2 K. B. 658.

Also Reported in 115 L. T. N. S. 453, 80 J. P. 446, 60 Sol. Jo. 696.

Criminal law — Evidence of accomplice — Corroboration — Nature of corroboration required.

Where on the trial of an accused person evidence is given against him by an accomplice, the corroboration which the common law requires is corroboration in some material particular tending to show that the accused committed the crime charged. It is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused.

(July 31, 1916.)

APPEAL to the Court of Criminal Appeal against conviction.

The prisoner was tried at the Central Criminal Court on an indictment charging him with having committed acts of gross indecency with two boys contrary to § 11 of the Criminal Law Amendment Act 1885. The only direct evidence of the commission of the acts charged was that of the boys themselves, who on their own statement were accomplices in the offense. The acts charged were alleged to have been committed in a flat in which the prisoner resided. The prisoner gave evidence and admitted that the boys, who were of a humble position in life, came to his flat by his invitation, but he accounted for that by saying that he invited them there from philanthropic motives, being desirous of getting them some better form of employment than that in which they were then engaged, and wishing to talk over their prospects with them. A letter was produced, addressed to one of the boys, which was in the following terms: "Dear Harry,—Here is something for you and Charlie. As to Sunday week, will you and he meet me as [659] arranged at 8, not 7:30. (Signed) B." The letter, which the prisoner admitted to be in his handwriting, contained a 10s. Treasury note. Charlie was the Christian name of the other boy. The judge warned the jury that they ought not to convict the prisoner upon the evidence of the boys unless it was in their opinion corroborated

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in some material particular affecting the accused, but told them that the above-mentioned letter afforded evidence which they would be entitled to find was sufficient corroboration. The jury found the prisoner guilty. The prisoner appealed against his conviction.

Marshall-Hall, K.C., and Ginsburg, for the appellant. There was here no evidence which the jury were warranted in treating as corroboration of the boys' story. It is no doubt well settled that a jury may convict on the evidence of accomplices alone provided they are given a proper warning that they ought not to do so unless there is sufficient corroboration (*Reg. v. Avery* (1845) 1 Cox, C. C. 206; *In Re Meunier* [1894] 2 Q. B. 415, 63 L. J. Mag. Cas. 19, 10 Reports, 400, 71 L. T. N. S. 403, 42 Week. Rep. 637, 18 Cox, C. C. 15; *Reg. v. Andrews* (1845) 1 Cox, C. C. 183); but where the evidence alleged to be corroboration is not in law sufficient to be left to the jury as such, a warning which neglects to tell them so is not a proper warning. Here the judge misdirected the jury in telling them that they might find that the letter was sufficient corroboration. Being capable of an innocent construction, it does not go to implicate the accused. The rule on this subject is correctly laid down in *Russell on Crimes*, 7th ed., vol. 2, p. 2287: "It is not sufficient to corroborate an accomplice as to the facts of the case generally. He should be corroborated as to some material fact or facts which go to prove that the prisoner was connected with the crime charged." That proposition is abundantly supported by authority. In *Rex v. Wilkes* (1836) 7 Car. & P. 272, Alderson, B., directed the jury that confirmation of the accomplice as to the commission of a felony is no confirmation at all unless it "goes to fix the guilt on the particular person charged." In *Reg. v. Farler* (1837) 8 Car. & P. 106, Lord Abinger, in summing up to a jury, said: "The corroboration ought to consist in some circumstance that affects the identity of the party accused." In that case, which was [660] one of night poaching, he told the jury that the fact that the prisoner and the accomplice were drinking together late at night in a public house to which the former habitually resorted was no sufficient corroboration.

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ration of the prisoner's guilt. In *Reg. v. Dyke* (1838) 8 Car. & P. 261, Gurney, B., said: "The confirmation should be as to some matter which goes to connect the prisoner with the transaction." In *Reg. v. Birkett* (1839) 8 Car. & P. 732, Patteson, J., said: "If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient." In *Reg. v. Jenkins* (1845) 1 Cox, C. C. 177, it was laid down that "where there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one is no confirmation of his testimony as to the other." In *Reg. v. Mullins* (1848) 3 Cox, C. C. 526, 531, Maule, J., said: "The confirmation of an accomplice as to the mere fact of a crime having been committed, or even the particulars of it, is immaterial, unless the fact of the prisoner being connected with it is so," *i. e.*, confirmed. In *Reg. v. Stubbs* (1855) Dears. C. C. 555, 557, 558, Jervis, C.J., said: "Where an accomplice speaks as to the guilt of three prisoners, and is confirmed as to two of them only, the jury may, no doubt, if they please, act on the evidence of the accomplice alone as to the third prisoner; but it is proper for the judge in such a case to advise the jury that it is safer to require confirmation of the testimony of the accomplice as to the third prisoner, and not to act upon his evidence alone;" and Parke, B., stated the rule of practice in similar terms. On the other hand, Wightman, J., stated that "it has not been the uniform practice to require confirmation as to all the prisoners. In some cases it has been held that, if there be confirmation of the accomplice as to one of the prisoners, the jury may convict as to all." In *Rex v. Everest* (1909) 2 Cr. App. Rep. 130, 132, where the appellant was charged with being party to a robbery, Darling, J., said: "The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused. It is not sufficient that there should be corroboration in [661] some particular which does not touch the prisoner." The court there quashed the conviction upon the ground that the fact of the appellant having

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been seen in a public house talking to the admitted thief shortly before the robbery was no evidence of his being a party to it. The correctness of the rule as above laid down was not seriously questioned till 1911, when Lord Alverstone, C.J., in the case of *Rex v. Wilson* (1911) 6 Cr. App. Rep. 125, 128, said: "It must not be supposed that corroboration is required, amounting to independent evidence implicating the accused." That *dictum* was only *obiter*, as the court, being of opinion that a sufficient caution had been given, dismissed the appeal. In a later case in the same volume, *Rex v. Blatherwick* (1911) 6 Cr. App. Rep. 281, Lord Alverstone, C.J., in the course of argument said: "*Everest* (1909) 2 Cr. App. Rep. 130, 132, goes too far; *Wilson* (1911) 6 Cr. App. Rep. 125, 128, is the correct statement of the law." In *Rex v. Watson* (1913) 8 Cr. App. Rep. 249, 253, Pickford, J., suggested that "corroboration generally that the story is true is sufficient," but he added that it was unnecessary to decide the question in that case. In *Rex v. Willis* [1916] 1 K. B. 933, 85 L. J. K. B. N. S. 1129, 114 L. T. N. S. 1047, 80 J. P. 279, 32 Times L. R. 452, 60 Sol. Jo. 514, Lord Reading, C.J., reaffirmed the rule as laid down in *Rex v. Wilson* (1911) 6 Cr. App. Rep. 125, 128, and explained certain *dicta* in his judgment in *Rex v. Cohen* (1914) 10 Cr. App. Rep. 91, from which it had been inferred that he was of the contrary opinion. It is contended that the rule as laid down in *Rex v. Everest* (1909) 2 Cr. App. Rep. 130, 132, is the correct one.

Bodkin, for the prosecution. The object of requiring corroboration of the evidence of an accomplice is merely to show that the witness was presumably telling the truth, and therefore the corroboration need not be in a matter directly affecting the prisoner's connection with the crime charged. The rule is correctly stated in Stephen's Digest of the Law of Evidence, art. 121: "When the only proof against a person charged with a criminal offense is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so." But in the present case it is unnecessary to decide the question, for there was in any view abundant corroboration pointing to the prisoner's guilt.
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[662] At the close of the arguments the Court intimated that in their opinion there was ample corroboration affecting the accused, and that the appeal would be dismissed; but that, having regard to the importance of the question raised and the difference of judicial opinion upon it, they would take time to consider their judgment.

Cur. adv. vult.

The judgment of the Court (Lord Reading, Ch. J., Scrutton, Avory, Rowlatt, and Atkin, JJ.) was delivered by

Lord Reading, Ch. J.: The appellant was convicted of having committed offenses under § 11 of the Criminal Law Amendment Act 1885, with two boys. He appeals to this court on the ground that there was no such corroborative evidence as is required by law of the testimony of the boys who were called for the prosecution at the trial and were accomplices in the crime. There is no statutory provision requiring corroboration applicable to these offenses.

At the close of the arguments we decided that there was abundant corroboration. In addition to the testimony of the accomplices, the following facts were given in evidence: A letter was proved to have been sent to one of the boys by the appellant in his handwriting, signed by him with his initial B., without any address on the letter, inclosing a 10s. note to "Dear Harry," one of the boys, for himself and "Charlie," another of the boys, and making an appointment for them to meet the appellant "as arranged," without naming the place, and at a time stated. The prisoner had admitted to the police that the boys had been at his flat, that he knew one as a page boy at the Trocadero Restaurant, and that this boy had been to see him on several occasions with another boy, and the appellant suggested to the police that he belonged to a boys' club and, therefore, was entitled to invite any of the members to his place. The appellant was not a member of a boys' club. The appellant gave evidence at the trial and admitted that he had given money to the boys on various occasions, and that, on hearing a peculiar whistle outside his flat, he had gone downstairs to let the boys in. We entertained

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no doubt that this evidence afforded ample corroboration of the boys' testimony, even if we assumed that the corroboration required was corroboration "in some material particular implicating the [663] accused." The learned Recorder directed the jury that they must not convict upon the testimony of the accomplices unless they were satisfied that there was "corroboration in some material particular affecting the accused." We were of opinion that in any event this direction gave no cause of complaint to the appellant. The warning by the Recorder to the jury was sufficient, if indeed not more than sufficient. We therefore intimated that the appeal would be dismissed.

Having regard, however, to the arguments addressed to the court, and to the difficulty of reconciling all the opinions expressed in the cases cited, and to the general importance of reviewing and restating the law applicable to corroboration of the evidence of accomplices, we took time to consider our judgment.

There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. See *Rex v. Atwood* (1787) 1 Leach, C. C. 464. But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. *Reg. v. Stubbs* (1855) Dears. C. C. 555, 25 L. J. Mag. Cas. N. S. 16, 1 Jur. N. S. 1115, 4 Week. Rep. 85, 7 Cox, C. C. 48; *In re Meunier* [1894] 2 Q. B. 415, 63 L. J. Mag. Cas. N. S. 198, 10 Reports, 400, 71 L. T. N. S. 403, 42 Week. Rep. 637, 18 Cox, C. C. 15.

This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal Act came into operation this court has held that, in the absence of such a warning by the judge, the conviction must be quashed. *Rex v. Tate* [1908] 2 K. B. 680, 77 L. J. K. B. N. S. 1043, 99 L. T. N. S. 620, 72 J. P. 391, 52 Sol. Jo. 699, 15 Ann. Cas. 698. If after the proper caution by the judge the jury nevertheless convict the prisoner, this court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated: 10 B. R. C.

It can but rarely happen that the jury would convict in such circumstances. In considering whether or not the conviction should stand, this court will review all the facts of the case, and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. But this court, in the exercise of its powers, will quash a conviction even when the judge has given to the jury the warning or advice above mentioned if this court, after [664] considering all the circumstances of the case, thinks the verdict unreasonable, or that it cannot be supported having regard to the evidence. Court of Criminal Appeal Act 1907, § 4, subs. 1. This jurisdiction gives larger powers to interfere with verdicts than had heretofore existed in criminal cases.

In addition to the rule of practice above mentioned, there are, with regard to certain offenses, statutory provisions that no person shall be convicted upon the evidence of one witness unless such witness be corroborated in some material particular implicating the accused, *e. g.*, the Criminal Law Amendment Act 1885, §§ 2 and 3. In these cases the law is that the judge, in the absence of such corroborative evidence, must stop the case at the close of the prosecution and direct the jury to acquit the accused. Where no such statutory provision is applicable to the offense charged, and the evidence for the prosecution consists of the uncorroborated testimony of an accomplice or accomplices, the law is that the judge should leave the case to the jury after giving them the caution already mentioned.

As the rule of practice at common law was founded originally upon the exercise of the discretion of the judge at the trial, and, moreover, as it is anomalous in its nature, inasmuch as it requires confirmation of the testimony of a competent witness, it is not surprising that this rule should have led to differences of opinion as to the nature and extent of the corroboration required, although there are propositions of law applicable to corroboration which are beyond controversy. For example, "confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary." *Reg. v. Mullins* (1848) 3 Cox, C. C. 526, 531, per Maule, J. Indeed, if it were required that the

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accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony. Again, the corroboration must be by some evidence other than that of an accomplice, and therefore one accomplice's evidence is not corroboration of the testimony of another accomplice. *Rex v. Noukes* (1832) 5 Car. & P. 326. The difference of opinion has arisen in the main in reference to the question whether the corroborative evidence must connect the [665] accused with the crime. The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. If the only independent evidence relates to an incident in the commission of the crime which does not connect the accused with it, or if the only independent evidence relates to the identity of the accused without connecting him with the crime, is it corroborative evidence? There are some expressions to be found in the books which imply that it may be, and in *Rex v. Birkett* (1813) Russ. & R. C. C. 251, the judges were of opinion that an accomplice did not require confirmation as to the person he charged, if he was confirmed as to the particulars of his story. The case is very imperfectly reported, and the evidence is not stated. It was not argued by counsel, but was stated verbally to a meeting of the judges by the judge who tried the case. There are other cases where it has been held that a conviction on such evidence could not be quashed by the court, but the *ratio decidendi* is that as an accomplice is a competent witness and the jury thought him worthy of credit, the verdict was in accordance with law. *Rex v. Atwood* (1787) 1 Leach, C. C. 464; *Rex v. Jones* (1809) 2 Campb. 131, 11 Revised Rep. 680. There are other cases where it has been held that on such evidence the case cannot be withdrawn from the jury. *Rex v. Hastings* (1835) 7 Car. & P. 152; *Reg. v. Andrews* (1845) 1 Cox, C. C. 183, per Coleridge, J.; *Reg. v. Avery* (1845) 1 Cox, C. C. 206. After examining these and other authorities to the present date, we have come to
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the conclusion that the better opinion of the law upon this point is that stated in *Reg. v. Stubbs* (1855) Dears. C. C. 555, 25 L. J. Mag. Cas. N. S. 16, 1 Jur. N. S. 1115, 4 Week. Rep. 85, 7 Cox, C. C. 48, by Parke, B., namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner. The learned Baron does not mean that there must be confirmation of all the circumstances of the crime; as we have already stated, that is unnecessary. It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime. Parke, B., gave this [666] opinion as a result of twenty-five years' practice; it was accepted by the other judges, and has been much relied upon in later cases. In *Reg. v. Wilkes* (1836) 7 Car. & P. 272, Alderson, B., said: "The confirmation which I always advise juries to require is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony; but I advise juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offense." In *Reg. v. Farler* (1837) 8 Car. & P. 107, Lord Abinger, C.B., said: "It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. . . . It would not at all tend to show that the party accused participated in it." In *Reg. v. Dyke* (1838) 8 Car. & P. 261, Gurney, B., said: "Although, in some instances, it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the transaction." In *Reg. v. Birkett* (1839) 8 10 B. R. C.

Car. & P. 732, the prisoner was indicted for receiving stolen sheep. The evidence consisted of the statement of an accomplice, and to confirm it it was proved that a quantity of mutton corresponding in size with the sheep stolen was found in the prisoner's house. Patteson, J., said: "If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient, . . . but here we have a great deal more; we have a quantity of mutton found in the house in which the prisoner resides, and that I think is such a confirmation of the accomplice's evidence as I must leave to the jury."

These cases lead to the view expressed later by Parke, B., in *Reg. [667] v. Stubbs, supra*, and show that in his time, although there had been doubt in the past, the law as formulated by him was accepted as the correct opinion, and continued to be the law to the time of the passing of the Criminal Appeal Act, and in our judgment to the present day.

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offenses for which corroboration is required by statute. The language of the statute, "implicates the accused," compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offense charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

The corroboration need not be direct evidence that the accused

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committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in *Reg. v. Birkett, supra*. Were the law otherwise many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice.

The decisions of this court upon the nature of the corroboration required call for some examination, and it is because they do not always appear to be to the same effect that this court was specially constituted in order that we might lay down rules for future guidance.

[668] In *Rex v. Everest* (1909) 2 Cr. App. Rep. 130, 132, the court said: "The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused." We think, "tell the jury to acquit," should read, "warn the jury of the danger of convicting." There is no statement in the report of the exact warning given by the judge. In *Rex v. Wilson* (1911) 6 Cr. App. Rep. 128, there was an abundant caution, and the court said: "It must not be supposed that corroboration is required amounting to independent evidence implicating the accused." If this means that the judge should not warn the jury to require independent corroboration of some part of the story which implicates or involves the accused, it goes too far.

In *Rex v. Blatherwick* (1911) 6 Cr. App. Rep. 281, the court said: "*Everest* (1909) 2 Cr. App. Rep. 130, goes too far. *Wilson* (1911) 6 Cr. App. Rep. 128, is the correct statement of the law." We agree that *Everest* goes too far in saying that the judge should direct the jury to acquit, but *Everest* is the better statement of the law as regards the corroboration for which the jury should look.

In *Bradshaw v. Waterlow & Sons* [1915] 3 K. B. 527, 534, [1915] W. N. 292, 31 Times L. R. 556, Pickford, L.J., in the Court of Appeal, was of opinion that *Wilson's* and *Blatherwick's* cases showed "that it is not necessary to have corroboration
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directly implicating the accused, if the corroboration which exists supports the truth of the story as a whole." The learned Lord Justice was merely stating his view of these cases in regard to the case then before the court. He found, however, that in fact there was corroboration directly implicating the accused in the case then under appeal, and it was, therefore, unnecessary to consider further the cases of *Everest*, *Wilson*, and *Blaithewick*.

In *Rex v. Cohen* (1914) 10 Cr. App. Rep. 101, the court did not attempt to deal with the difference of opinion manifested by the decisions of *Everest* (1909) 2 Cr. App. Rep. 130, and *Wilson* (1911) 6 Cr. App. Rep. 128, but, as explained in *Rex v. Willis* [1916] 1 K. B. 933, 85 L. J. K. B. N. S. 1129, 114 L. T. N. S. 1047, 80 J. P. 279, 32 Times L. R. 452, 60 Sol. Jo. 514, 12 Cr. App. Rep. 44, 47, decided the case on the assumption that the more favorable view of the law to the appellant as laid down in *Everest's Case* was right. The court there said that it was the practice of this court to require corroboration [669] before it could allow a conviction to stand. We did not intend to lay down such a rule of practice. It is too strongly expressed and is too general a statement; the correct view is that laid down earlier in the present judgment.

The latest case is *Rex v. Willis, supra*. The court there stated: "Certain statutes provide that certain classes of evidence shall not be sufficient to support a conviction unless corroborated by some other material evidence implicating the accused; but where corroboration is required by the common law it is not subject to any such qualification." It follows from the law laid down in the present judgment that that is a correct view to the effect that the verdict of a jury properly warned would not be set aside merely because they had believed an accomplice without corroboration implicating the accused, but it must not be read as meaning that the corroboration need not be independent evidence implicating the accused.

The case of *Rex v. Cooper* (1914) 10 Cr. App. Rep. 195, was referred to during the course of the argument. That case turned upon special facts relating to the medical testimony. It did not alter the law.

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Now that we have stated the law to be applied in future cases, we trust that it will be unnecessary again to refer to the earlier decisions of this court.

The question was discussed on the hearing of this appeal whether the evidence of an accomplice against two prisoners, corroborated as to one prisoner's participation in the crime, but not as to the other, can be regarded as corroboration with regard to both prisoners. We think the law is correctly stated by Alderson, B., in *Reg. v. Jenkins* (1845) 1 Cox, C. C. 177. The learned Baron said: "Where there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one is no confirmation of his testimony as to the other. If, therefore, you find there is a corroboration applicable to one prisoner, take it as against him; but unless it exists with regard to both, it seems to me it would be unjust to give it a general effect." The case of *Rex v. Jones* (1809) 2 Campb. 131, 132, may appear at first sight to be in the contrary direction, but, upon [670] closer examination, we do not think that Lord Ellenborough intended to decide more than that when two prisoners are tried and convicted upon the evidence of an accomplice corroborated as to the one but not as to the other, the conviction of the other must nevertheless be regarded as a conviction which was good in law. Lord Ellenborough was upholding the rule of law that a conviction founded upon the evidence of an accomplice only could not be treated as bad in law. His Lordship said: "Judges in their discretion will advise a jury not to believe an accomplice unless he is confirmed, or only in as far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes. It is allowed that he is a competent witness; and the consequence is inevitable that, if credit is given to his evidence, it requires no confirmation from another witness."

We see no reason in principle why a different rule as to corroboration should apply to a prisoner tried with another, against whom there is corroborative evidence of the accomplice's story, from that applicable if the first prisoner had been tried alone. In that case the uncorroborated evidence of the accomplice would be admissible against him, but it would be the judge's duty to
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give the proper caution to the jury; and it would be equally incumbent upon the judge to give the warning to the jury when the prisoner is tried with another against whom there was corroboration of the accomplice's story. If the judge failed to give the warning, this court would be bound to set aside the conviction. If the judge gave the warning, this court would then have to consider all the circumstances of the case as already indicated.

The appeal stands dismissed.

Appeal dismissed.

Solicitor for appellant: *Freke Palmer*.

Solicitor for the Crown: *Director of Public Prosecutions*.

Note.—Criminal law, nature of corroboration required to warrant conviction upon evidence of accomplice.

The law relative to the nature and sufficiency of evidence required to corroborate an accomplice's testimony is elaborately reviewed and restated in the reported case (*REX v. BASKERVILLE*, *ante*, 337).

The court there calls attention to the fact that with regard to certain offenses in England there are statutory provisions expressly governing the nature and sufficiency of the evidence required to corroborate accomplices. At common law there was a difference of opinion as to the nature and extent of the corroboration required. Some propositions of law applicable to corroboration are, as stated by the court in the reported case, beyond controversy; as, for example, that corroborative evidence need not extend to every material particular, circumstance, or detail of the testimony of the accomplice, since otherwise his testimony would be unnecessary. The main difference of opinion has arisen with respect to the question whether the corroborative evidence must connect the accused with the crime. The court in *REX v. BASKERVILLE*, after examining the authorities and calling attention to the fact that some of them have taken the view that the corroboration was sufficient, although the only independent evidence related to an incident in the commission of the crime, and did not connect the accused with it, or although the only independent evidence related to the identity of the accused, without connecting him with the crime, states that they had reached the conclusion that the better opinion on the question is that announced by Parke, B., in *Reg. v. Stubbs* (1855) Dears C. C. 555, 25 L. J. Mag. Cas. N. S. 16, 1 Jur. N. S. 1115, 4 Week. Rep. 85, 7 Cox, C. C. 48, to the effect that the evidence

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of an accomplice must be confirmed, not only as to the circumstances of the crime, but also as to the identity of the accused.

The court states that Baron Parke did not mean by this statement that there must be confirmation of all the circumstances of the crime, but that it is sufficient if there is confirmation as to a material circumstance of the crime, and of the identity of the accused in relation to the crime. The conclusion reached in the reported case is supported by the following English cases: *Rex v. Wilkes* (1836) 7 Car. & P. 272; *Reg. v. Farler* (1837) 8 Car. & P. 107; *Reg. v. Dyke* (1838) 8 Car. & P. 261; *Reg. v. Birkett* (1839) 8 Car. & P. 732.

These, together with the decision in *REX v. BASKERVILLE*, now render the law in England well settled.

The view has been taken in some cases in the United States that corroboration of a material part of an accomplice's testimony is sufficient, and that it need not necessarily connect the defendant with the commission of the alleged crime. *State v. Gallivan* (1902) 75 Conn. 326, 96 Am. St. Rep. 203, 53 Atl. 731; *Carroll v. Com.* (1877) 84 Pa. 107, 2 Am. Rep. 290.

The weight of authority in the United States, however, at common law, is in accord with the reported case (*REX v. BASKERVILLE*) and requires evidence corroborative of an accomplice connecting, or tending to connect, the accused with the alleged crime, in order to support a conviction.

United States v. Lancaster (1894) 10 L.R.A. 335, 44 Fed. 896; *Rhodes v. State* (1904) 141 Ala. 66, 37 So. 365; *Middleton v. State* (1874) 52 Ga. 527, 1 Am. Crim. Rep. 194; *Taylor v. State* (1899) 110 Ga. 150, 35 S. E. 161; *Baldwin v. State* (1915) 16 Ga. App. 174, 84 S. E. 727; *State v. Pepper* (1860) 11 Iowa, 347; *State v. O'Callaghan* (1912) 157 Iowa, 545, 138 N. W. 402; *Bowling v. Com.* (1881) 79 Ky. 604; *Com. v. Holmes* (1879) 127 Mass. 424, 34 Am. Rep. 391; *State v. Kent* (1895) 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631; *Martin v. State* (1916) 12 Okla. Crim. Rep. 510, 159 Pac. 940; *Campbell v. State* (1916) 12 Okla. Crim. Rep. 349, 157 Pac. 49; *State v. Jarvis* (1890) 18 Or. 360, 23 Pac. 251, 8 Am. Crim. Rep. 367; *Hicks v. State* (1912) 126 Tenn. 359, 149 S. W. 1055; *McNelly v. State* (1894) 5 Wyo. 59, 36 Pac. 824.

Statutes are in force in many states expressly regulating the nature and sufficiency of evidence required in corroboration of accomplices. Many of these statutes specifically require corroborative evidence tending to connect the accused with the commission of the alleged offense, and, under these, corroboration is insufficient which merely tends to show the commission of an offense or the circumstances of it.

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Reynolds v. State (1912) 14 Ariz. 302, 127 Pac. 731; *People v. Robbins* (1915) 171 Cal. 466, 154 Pac. 317; *State v. Bond* (1906) 12 Idaho, 424, 86 Pac. 43; *State v. Russell* (1894) 90 Iowa, 493, 58 N. W. 890; *Com. v. McGarvey* (1914) 158 Ky. 570, 165 S. W. 973; *State v. Calder* (1899) 23 Mont. 504, 59 Pac. 903; *People v. O'Farrell* (1903) 175 N. Y. 323, 67 N. E. 588; *People v. Everhardt* (1887) 104 N. Y. 591, 14 N. E. 62; *State v. Sonnenschein* (1916) 37 S. D. 585, 159 N. W. 101; *Whetstone v. State* (1916) 79 Tex. Crim. Rep. 104, 182 S. W. 1117; *Coleman v. State* (1875) 44 Tex. 109; *State v. Bridwell* (1916) 48 Utah, 97, 158 Pac. 710.

In view of the temptations generally besetting an accomplice in testifying, it appears that the rule adopted and restated in *Rex v. BASKERVILLE*, and which, as appears above, is operative in most of the United States, is undoubtedly the one most conducive to justice.

J. T. W.

[ENGLISH DIVISIONAL COURT.]

BUTTERWORTH *v.* BUTTERWORTH and
ENGLEFIELD.

COLLINS *v.* COLLINS and HARRISON.

BARRATT *v.* BARRATT and FOX.

HOWELL *v.* HOWELL and WALKER.

ADAMS *v.* ADAMS and WARD.

ELLWORTHY *v.* ELLWORTHY and LEDGARD.

L. R. [1920] Prob. 126.

Also Reported in 122 L. T. N. S. 804, [1920] W. N. 96, 36 Times L. R. 265.

Divorce — Practice — Claims for damages.

Claims for damages against the corespondent in divorce proceedings under the Matrimonial Causes Act are to be tried on the same principles and in the same manner as common-law actions for crim. con.

— Proof of special damages.

Claims for damages against the corespondent, in divorce proceedings are in substance actions on the case, and special damages must be proved.

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Criminal conversation — Measure of damages — Value of wife — Injury to feelings.

Damages in actions in the nature of crim. con. under the Matrimonial Causes Act are compensatory, and not exemplary, and are given on the actual value of the wife lost, and for the injury to the husband's feelings, honor, and family life.

— Measure of damages — Value of wife.

The value of the wife as an element of damages in actions in the nature of crim. con. has a pecuniary aspect which depends on her fortune and ability, and a consortium aspect depending upon her character and abilities as wife or mother.

— Relevancy of conduct of adulterer.

The conduct of the adulterer in an action in the nature of crim. con. has little bearing on the pecuniary aspect of the wife's value, but may be relevant as an aid to estimating her value with respect to the consortium aspect, and also in estimating the injury to the husband's feelings.

— Relevancy of husband's character and conduct.

In actions in the nature of crim. con. the husband's own character and conduct are as fully in issue as those of his wife.

— Relevancy of wealth or poverty of adulterer.

In actions in the nature of crim. con. the amount of compensation cannot depend on the wealth or poverty of the adulterer, but the way in which he has used his wealth in gaining his end may be relevant in the same way as his conduct generally.

— Relevancy of adulterer's rank and fortune.

In actions in the nature of crim. con. the rank and fortune of the adulterer are properly to be taken into consideration in so far as they may give assistance in ascertaining the wife's value, or measuring the extent of the injury to the husband, and general evidence as to the correspondent's rank and fortune is relevant, as to give damages which it would be impossible for him to pay might defeat the aim of giving of any.

— Adulterer's ignorance that respondent was married.

A court can give damages against an adulterer in an action in the nature of crim. con., although he was ignorant that the woman was married, but to do so is not sound policy, the balance of authority being against it, such damages savoring of a punitive character, and a wife who passes herself off as a single woman being deemed valueless under such circumstances, and the allowance of damages being in conflict with the court's practice as to costs.

Divorce — Claims for damages — Costs — Correspondent's ignorance of respondent's marriage — Practice.

In actions in the nature of crim. con. it is a well-established practice that costs should not be given against an adulterer who had no knowledge of the marriage.

Criminal conversation — Knowledge of marriage — Burden of proof.

In actions in the nature of crim. con. the burden of proving knowledge by the adulterer that the woman was married is on the complainant.

(February 10, 1920.)

ALL these six cases, which came on before McCardie, J., on the date above mentioned, were husbands' petitions for divorce on the ground of their wives' adultery with named corespondents, against whom they claimed damages and costs. In each case McCardie, J., found the adultery proved, [128] and granted a decree nisi, but reserved the question of damages and costs for further consideration. The causes were all undefended.

W. O. Willis, R. R. Ludlow, Beddington, W. O. Willis, Honorable Victor Russell, and Cotes-Preedy, for the several petitioners.

It is thought that the arguments sufficiently appear from the judgment.

McCardie, J., delivered the following considered judgment: In each of the six undefended cases now before me, I granted the husband a decree nisi by reason of his wife's adultery.

In each case the petitioner asked for damages and costs against the corespondent. This was the first time I had been called upon to assess damages in divorce proceedings or to consider the question of costs in connection with the award of damages. I therefore reserved my decision on both points. The matters at issue are of great importance and constant recurrence, and the relevant authorities reveal a striking conflict of opinion as to the principles to be applied and the considerations to be regarded. Hence I desired to consider the arguments.

Up to the passing of the Juries Act 1918, questions of damages were necessarily decided by a jury, whilst costs were always determined by the court. The view of a jury as to damages did not necessarily agree with the view of a judge as to costs. But in the great majority of cases since the passing of the act a judge alone deals with damages as well as costs, and the double function suggests that the time has arrived to review, and, if possible, to reconcile, the authorities.

I shall not set out the detailed facts in the six cases; they vary greatly. It is better that principles should not be obscured by circumstances. At the conclusion of this judgment, therefore, I
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shall merely indicate the broad results at which I arrive upon each petition.

The powers of the Divorce Court to award damages for [129] adultery rests on § 33 of the Matrimonial Causes Act 1857, which act abolished the old action of criminal conversation. But § 33 provided that the claim made for damages on the petition of the husband should be tried by a jury on the same principles, in the same manner, and subject to the same rules and regulations as actions for criminal conversation were tried at common law. It further provided that the court should have power to direct in what manner such damages should be paid or applied, and to direct that the whole or any part thereof should be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife. This latter provision (be it observed) leaves it to the court to decide the portion of the awarded damages which is to go to the petitioner himself. The provision is curious in view of the fact that in actions for criminal conversation the damages were deemed to be given to the husband as compensation for the injury suffered by him. The breadth of § 33 was greatly modified by the decision of the Court of Appeal in *Bernstein v. Bernstein*, L. R. [1893] Prob. 292, 63 L. J. Prob. N. S. 3, 69 L. T. N. S. 513, 12 Eng. Rul. Cas. 783, which decided that the claim for damages must fail if the claim for a decree nisi itself failed, *e. g.*, by reason of condonation; and so, also, if the petition claimed damages only. If a suit for dissolution founded on the adultery in question fail, then again the claim for damages falls to the ground. See *Cox v. Cox and Warde*, L. R. [1906] Prob. 267, 75 L. J. Prob. N. S. 75, 95 L. T. N. S. 546, 22 Times L. R. 557; *Stocker v. Stocker, Brice and Patterson*, L. R. [1917] Prob. 264, 117 L. T. N. S. 543, 33 Times L. R. 533. Excluding, then, the cases which fall within *Bernstein v. Bernstein*, *supra*, and excluding also the specific provision of § 33 as to the allocation of awarded damages, it is clear that the claim to damages is to be tried as if in an action for criminal conversation. Hence it is essential to consider that form of action. It must be carefully distinguished from the common-law action which lay either for knowingly seducing away a wife from cohabitation with the husband, or for

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harboring a wife after notice that she had left her husband without his consent. Forms of pleading in the latter class of action are given in Bullen and Leake's *Precedents on Pleading*, 3d ed., [130] (1868), p. 340. It is essential in such actions to allege that a defendant knew that the woman was married. It seems clear from the famous case of *Winsmore v. Greenbank* (1745) Willes, Rep. 577, 125 Eng. Reprint, 1330, that those actions are founded not in trespass, but in case, and that the plaintiff must prove actual loss.

The above two classes of action apparently remain in existence at the present day. See Addison on Torts, 8th ed., p. 858, and *Smith v. Kaye* (1904) 20 Times L. R. 261, per Wright, J. The basis is that the husband has the right to the service and society of his wife, just as a father has the right to the service of his children. It is proper to observe that no damages can be obtained for the harboring of a wife against a husband's will, if the latter has been guilty of misconduct causing his wife to leave, or if the defendant acted upon humanitarian motives in the belief that the wife had justifiably quitted the husband's abode. See *Philp v. Squire* (1791) 1 Peake, N. P. Cas. 114, 3 Revised Rep. 659; *Berthon v. Cartwright* (1796) 2 Esp. 480. Actions by a husband for the loss of a wife's society or services through an assault upon her or through negligence whereby she is physically injured are, of course, well known to the common law. But all these cases are wholly distinct from claims for damages for criminal conversation. See Bullen and Leake's *Precedents of Pleadings* (1868) 3d ed., p. 340n.

Ere I deal with the action for criminal conversation it is well to point out that it is doubtful if the wife has any right of action against a woman who entices away a husband, or harbors him after his wrongfully quitting the domestic abode. Apparently the law takes the view that the wife has no such right of control or claim to a husband's services as is possessed by the husband with regard to the wife. See Clerk and Lindsell on Torts (1912), 6th ed., p. 245. In *Lynch v. Knight* (1861) 9 II. L. Cas. 577, 11 Eng. Reprint, 854, 5 L. T. N. S. 291, 8 Eng. Rul. Cas. 382, Lord Wensleydale expressly held that no such right of action existed in the wife, although the opinions of Lord
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Campbell and Lord Cranworth may tend to the contrary view. The reason for Lord Wensleydale's view is concisely [131] put by Lush, J., in his *Treatise on the Law of Husband and Wife*, 3d ed. p. 13, where he points out that "the wife is under the coverture and protection of the husband, but the husband is not under the coverture or protection of the wife."

It may be said that this result sprang from the inability of a wife, prior to 1882, to sue at law without the joinder of her husband as a coplaintiff. This requirement would clearly prevent the commencement of any effective litigation by the wife. But in my view the apparent inability of the wife to bring such an action sprang from the legal doctrine above indicated, that the rights of a husband with regard to the person and society of his wife were different to and far greater than the rights of a wife with respect to the society and person of a husband. In many of the States of North America a different view prevails, and actions by the wife against another woman for alienation of affection and the concomitant wrong of diverting the husband's society and domestic virtues from the wife, are prominent features of the law reports of the various States.

The action for criminal conversation was based on the mere act of adultery. Once a husband could prove such misconduct he could bring his action for damages although he was unable to allege or prove that he had lost the society and cohabitation of his wife. This seems patent from all the old authorities, and specially from the curious case of *Wilton v. Webster* (1835) 7 Car. & P. 198, 202, where the husband obtained damages from the adulterer although the husband remained in full cohabitation with his wife and only became aware of her infidelity whilst she lay upon her deathbed.

In a claim for criminal conversation, therefore, the matter to be proved was the adultery. Enticing away or harboring of the wife operated as mere matters of aggravation. It was not necessary to allege or prove in such an action that the defendant knew that the woman was married. See *Chitty on Pleadings* (1844), 7th ed., vol. ii., pp. 484, 653. This action of criminal conversation was, as a general rule, framed in trespass, and the misconduct was alleged to have been committed *vi et* [132] *armis*. See 10 B. R. C.

Comyns' Digest (1822), 5th ed. vol. I. p. 519. The law appeared to have assumed that the wife had no power to consent and therefore that the act was done against her by force. But although technically laid in trespass the action was in substance one upon the case. It possessed the essential features of the latter class of action. This is clear from the cogent and I think unanswerable reasons given in Chitty on Pleading (1844), 7th ed., vol. ii., pp. 484, 653, and Tidd's Practice (1828), 7th ed., vol. i., p. 4.

The importance of this point will become apparent when I consider later whether the court is bound upon proof of adultery and the grant of a decree nisi to award some damages, however small, to the petitioner. If the claim be one for strict trespass, then nominal damages, at least, should technically be awarded for the infringement of the husband's right. But if the claim be one merely in case—*i. e.*, for damage actually sustained—then the court is not bound to award any damages at all unless actual damage be proved. That the action is one not for strict trespass but in case seems reasonably clear from all the authorities. For "the gist of actions of this sort is the loss to the husband of the comfort and society of the wife," which was always inserted in the old declarations as a material and essential allegation. See Shelford on Marriage (1841), p. 390. The action for criminal conversation was really *sui generis*. It presented unique features.

I may point out that the right of action for criminal conversation existed only in the husband (see Shelford on Marriage (1841), p. 387); and upon the wording of § 33 of the Act of 1857 it is obvious that it is the husband only, and not the wife, who can insert a claim for damages in the petition.

The origin of the action need not be traced. It began at a time when the wife was, in substance, regarded by the common law as the property of her husband. The benefits of her fortune went to him at common law upon marriage. His power of personal control was great. Even her earnings could be seized by him. She was viewed as a child, and was therefore subject to physical punishment at his hands, provided [133] it was moderate in extent. See Blackstone's Commentaries, (1787) 10th 10 B. R. C.

ed., vol. i., p. 444. The statutory relaxation of his power over her fortune and earnings is quite modern. See the Married Women's Property Acts of 1870 and 1882. The diminution of his power of physical control or punishment was gradual, and the decision of the Court of Appeal in *Reg. v. Jackson* [1891] 1 Q. B. 671, 60 L. J. Q. B. N. S. 346, 64 L. T. N. S. 679, 39 Week. Rep. 407, 55 J. P. 246, marked the disappearance of the old and harsh view of a husband's rights over the body of the woman he has taken to wife.

It seems to me, therefore, that the common law found its technical basis for the action for criminal conversation in the strict view it took as to the power of a husband over the person and the property of a wife. As stated at p. 126 of the Report of the Royal Commission on Divorce (1912): "It seems to have been founded on notions of property." But I conceive it well to suggest that beneath this technical and somewhat sordid basis there lay perhaps a cogent moral foundation. The law has ever regarded the sanctity of married life as a matter of grave moment. It may be, therefore, that one of the original objects of the action was to maintain the purity of married life, and to defend the honor of husband, wife, and children. The risk of damages might well have been deemed a check to the wanton inclinations of an intending adulterer. Whether the action has achieved its purpose I do not inquire. The matter is one for debate elsewhere. It may perhaps be regarded by many as a strong deterrent. It will suffice to say that the claim to damages for adultery is peculiar to Anglo-Saxon countries, and (as pointed out in the Royal Commission on Divorce (1912), p. 126) foreigners cannot understand how the English law allows it.

Now, what are the principles on which damages should be awarded? At the outset there arises the question whether the court is bound, upon proof of the adultery and the grant of a resultant decree, to assess any damages at all against the correspondent. In my humble opinion the court is under no such obligation. Section 33 requires that claims for damages be tried on the same principles and subject to the same rules [134] as an action for criminal conversation. That action, as I have ven-

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tured to point out, was, in substance, an action on the case. It was not a strict action for trespass. It follows, therefore, I think, that the jury were entitled, although adultery was proved, and although the defendant had failed to establish a technical defense (*e. g.*, privity of the plaintiff to the adultery), to find that the plaintiff had suffered no damage at all. This view seems to be agreeable to the trend of the old decisions and textbooks. The summing up of Alderson, J., in *Winter v. Henn* (1831) 4 Car. & P. 494, 498, is not, I think, when taken as a whole, really adverse to the view I have expressed. In substance the matter could be put thus. The claim was for actual loss and injury, and not for mere trespass. Therefore, if loss or injury were not shown, the claim for damages failed.

If then the jury could, before 1857, refuse to award damages in an action for criminal conversation, it follows that they possessed the same right when acting in the Divorce Court after 1857, in a petition for compensation for adultery. The point arose shortly before 1862. See *Spedding v. Spedding* (1862) 31 L. J. Prob. N. S. 96, note 1. In a note to this case it is stated that the Judge Ordinary (Sir Cresswell Cresswell) had told the jury in several cases that if the adultery was proved to their satisfaction, they were bound to assess the damages at some amount, however small. I respectfully venture to think that the law was not so, for the reasons I have given. Apparently the ruling of the Judge Ordinary was given on the assumption that the action was one of strict trespass.

This view was apparently taken by the same judge in *Stone v. Stone and Appleton* (1864) 3 Swabey & T. 608, 34 L. J. Prob. N. S. 33, 11 L. T. N. S. 515, 13 Week. Rep. 414, where the jury found a verdict of 1 farthing damages only.

In *Gardner v. Gardner* (1901) 17 Times L. R. 331, however (tried before Barnes, J.), the jury, after hearing evidence as to the irregular, intemperate, and violent habits of the wife before she had met the correspondent, found the adultery proved, but awarded no damages. That this finding was with the approval of that [135] distinguished judge is clear from the later case of *Gibson v. Gibson and West* (1906) 22 Times L. R. 361, 94 L. T. N. S. 619. There Barnes, P., stated that damages were
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awarded not to punish the corespondent for his misconduct, but to compensate a petitioner for the loss or injury he had sustained by that misconduct. The jury found that the respondent and corespondent had committed adultery, but added that in their view the case was not one for damages of any kind. Thereupon Barnes, P., said: "I quite agree." He accordingly granted a decree nisi with no damages. This view seems to fully agree with the opinion of Lord Hannen, who in summing up to the jury in *Darbishire v. Darbishire* (1890) 62 L. T. N. S. 664, 54 J. P. 408, said: "If a man's wife goes and walks the streets, the husband is not entitled to come here and recover damages against any man who goes and consorts with that woman." See also *Newby v. Newby and White* (1897) 77 L. T. N. S. 142, per Jeune, P.

I need only add two observations on this point. First, that it is desirable that the discretion of a judge as to damages should be as wide as that of a jury. Secondly, that the discretion of the judge as to costs under § 34 of the Act of 1857 perhaps renders immaterial the distinction between a finding of nominal damages and a finding of no damages at all.

Assuming, then, the power of the court or jury to withhold even nominal damages from the petitioner, even though he proves the adultery and obtains a decree, it is next necessary to consider the principles on which damages should be assessed. A basic question is whether the damages are compensatory only, or whether they may be what the law calls exemplary or punitive damages. If the former the powers of the assessing tribunal are far more limited than in a case where exemplary damages may be given. That the damages are at large is clear. This appears from all the decisions and text books; see, *e. g.*, per Jeune, J., in *Evans v. Evans and Platts* [1899] L. R. Prob. 195, 202, 68 L. J. Prob. N. S. 70, 81 L. T. N. S. 60, where he said to the jury: "The matter is entirely for you." But to say that the damages are at large merely avoids the difficulty of deciding whether they are merely compensatory or whether they may be exemplary. The meaning of the phrase [136] "exemplary damages" is aptly put in Sedgwick on Damages, 9th ed. (1913), § 347, where that distinguished author says: "In actions of tort where
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gross fraud, wantonness, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severe verdict, at once impose a punishment on the defendant and hold him up as an example to the community; . . . damages assessed on this principle are called exemplary, punitive, or vindictive damages." The origin of the doctrine of exemplary damages is ably dealt with by Sedgwick in the Treatise just mentioned. The illustrative English decisions are neatly and fully collected in Halsbury's Laws of England, vol. x., pp. 306-7. There it is well said: "Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant, may be taken into consideration, the principle of *restitutio in integrum* no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner and vindicate the distinction between a wilful and an innocent wrongdoer. The damages so awarded have been variously called exemplary, vindictive, penal, punitive, aggravated, or retributory. Except in the case of breach of promise of marriage, exemplary damages cannot be awarded in an action for breach of contract, since the existence of misconduct cannot alter the rule by which the damages for breach of contract are assessable. Such damages may, however, be awarded in an action for tort, as, for instance, assault, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution, and false imprisonment." These statements are supported by the decisions cited in Halsbury.

Exemplary damages have been graphically described in the Supreme Court of New Jersey as "a sort of hybrid between an assertion of ethical indignation and the imposition of a criminal fine." *Haines v. Schultz* (1888) 50 N. J. L. 481, 14 Atl. 488. They were unknown to the Roman civil law, nor are they, I believe, known in Scotland. But they are well established in England, [137] and the authorities cited in Halsbury show that the rule as to exemplary damages applies, *e. g.*, to the action for seduction of a daughter. As to that action Wilmot, C.J., said: "Actions of this sort are brought for example's sake, and although the plaintiff's loss in this case may not really amount to

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20s., yet the jury have done right in giving liberal damages." See *Tullidge v. Wade* (1769) 3 Wils. 18; 95 Eng. Reprint, 909. Damages given for "example's sake" are clearly punitive or exemplary in nature. In such an action there are really three distinct heads of damage,—namely, (a) pecuniary loss; (b) compensation for wounded feelings and injured pride; and (c) a sum of money of a penal nature in addition to the compensatory damage given for either pecuniary or physical and mental suffering. See Sedgwick on Damages, 9th ed. (1913), § 347.

Now if punitive damages could be given in an action for seduction of a child, I confess that I can see no good reason why they should not have been given in an action for criminal conversation—*i. e.*, for seduction of a wife—if such an action was allowed at all. Both actions seem in essence to rest upon the same footing. Such clearly was the view of Blackstone, who, referring to the action for criminal conversation, said: "The damages recovered are usually very large and exemplary." Commentaries, iii., 139. So, too, per Lord Mansfield in *Birt v. Barlow* (1779) 1 Dougl. K. B. 171, 174, 99 Eng. Reprint, 113, who said: "An action for criminal conversation has a mixture of penal prosecution." In such action damages are recoverable not only for pecuniary loss (which is often minute), but for wounded pride and injured feelings. See Taylor on Evidence, 10th ed. § 356.

But apparently the action for criminal conversation became conspicuously *sui generis*, and grew to be subject to particular rules as to damages, distinguishing it from other actions of tort. In none of the textbooks later than Blackstone¹ it is stated that the damages may be exemplary or punitive; *e.g.*, in Buller's *Nisi Prius* (1817), 7th ed. p. 26 (b), it is merely [138] stated that "as the injury is great, so the damages given are commonly very considerable." In Selwyn's *Nisi Prius*, 11th ed. (1849), p. 26, it is said only that "the damages given by the jury are in general proportioned to the degree of injury." In Tidd's *Practice* (1828), 9th ed. vol. ii., § 883, it is said: "Circumstances of aggravation of the injury may therefore operate as an induce-

¹ [Quite early in the 19th century Blackstone's editor Christian observed in his note on this passage: "It seems now to be the better opinion that no damages in an action" of this kind "ought to be vindictive."—F. P.]

ment to the jury to give large damages." I can find no case in which the judge told the jury that they might give exemplary or punitive damages in a case for criminal conversation. On the contrary, Alderson, J., in *Winter v. Henn* (1831) 4 Car. & P. 494, appears to attach great weight to the actual value of the wife to the husband; and in *Calcraft v. Earl of Harborough* (1831) 4 Car. & P. 499, 501, Tindal, C.J., points out to the jury that actions for criminal conversation were instituted to compensate a husband for the loss of intercourse between husband and wife. So, too, in *James v. Biddington* (1834) 6 Car. & P. 589, Alderson, B., said to the jury: "In a case of this kind a plaintiff is entitled to so much damages as a jury think is a compensation for the injury he has sustained." And finally Coleridge, J., in *Wilton v. Webster* (1835) 7 Car. & P. 198, 202, said: "The present plaintiff has a right to the full measure of damages that he is fairly entitled to as a compensation for the loss he has sustained; but you ought not to give vindictive damages, or lose your own temper while considering the conduct of others."

It thus appears that, for reasons which I cannot understand, an action for criminal conversation was, at the time when the Matrimonial Causes Act 1857 became law, apparently regarded as an action in which exemplary or punitive damages were not to be given. Very soon after the act was passed Sir Cresswell Cresswell pointed out to a special jury in the Divorce Court (see *Comyn v. Comyn and Humphreys* (1860) 32 L. J. Prob. N. S. 210) that they were to deal with the question of damages as if assessing them in a common-law action for criminal conversation. He then expressly told the jury that it was [139] not their function to punish the corespondent. Apparently that learned judge applied to a full extent the observations of Coleridge, J., in *Wilton v. Webster*, *supra*. The view of Sir Cresswell Cresswell has apparently become the established law of this court. Thus, in *Keyse v. Keyse and Maxwell* (1886) L. R. 11 Prob. Div. 100, 101, 8 Eng. Rul. Cas. 360, Lord Hannen said to the jury: "You are not here to punish at all. Any observations directed to that end are improperly addressed to you. All that the law permits a jury to give is compensation for the loss which the husband has sustained." So, too, in *Darbishire v. Darbishire* 10 B. R. C.

(1890) 62 L. T. N. S. 664: "The damages given in these cases are in the nature of compensation. . . . It is not at all your function to punish the adulterer." As a final selection from the decisions I may quote Sir Francis Jeune, who in *Evans v. Evans and Platts*, L. R. [1899] Prob. 195, 202, said to the jury: "It is not your duty to punish the corespondent; this court does not sit as a court of morality, to inflict punishment against those who offend against the social law." The importance of these rulings will hereafter appear.

I must, therefore, take it now to be the settled rule of this court (in spite of heavy verdicts given by certain juries) that compensatory damages only can be given, and that exemplary or punitive damages are not permissible. That it is not the function of the court to punish adultery as such, or to penalize mere sexual immorality as such, seems to be cogently shown by the apparently settled rule (to which I hereafter refer) that costs are not given against a corespondent who was unaware at the time of his adultery that the woman was married.

But the rule that damages are compensatory only gives rise to further doubt and difficulty when the decisions as a whole are considered. For if punitive damages cannot be given, then in what manner and to what extent is the conduct of the adulterer to be considered.

It is well to recall here the well-known passage from Buller's *Nisi Prius* (1817), 7th ed. p. 26 (a) and (b). He says: "As to adultery the action lies for the injury done to the husband [140] in alienating his wife's affection, destroying the comfort he had from her company and raising children for him to support and provide for. And as the injury is great so the damages given are commonly very considerable. But they are properly increased or diminished by the particular circumstances of each case; the rank and quality of the plaintiff, the condition of the defendant, his being a friend, relation, or dependent of the plaintiff, or being a man of substance, proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant and her having always borne a good character till then, and proof of a settlement or provision for the children of the marriage, are all proper circumstances of ag-

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gravation." The learned author then proceeds to deal with the various heads of mitigation which can be read in the light of recent well-known decisions.

Similar considerations to those named by Buller are indicated by the other well-known textbooks already cited, such as Blackstone, Selwyn, and Tidd. So, too, in nearly all the decisions the conduct of the adulterer has been regarded as important. I take an illustration of intermediate date between the old and modern decisions, the summing up of Sir Cresswell Cresswell in *Comyn v. Comyn and Humphreys* (1860) 32 L. J. Prob. N. S. 210, where he said: "The next topic that is generally considered is, What is the position of the defendant; how came he to be introduced? Under what circumstances did he become intimate with the family? Was there anything like treachery in his conduct? That is a legitimate consideration; not that you are to punish the man, but the conduct of the defendant,—the mode in which he proceeds to obtain the affections of the lady,—is important for your consideration." This is a typical summing up, and it is agreeable to the words of Tindal, C.J., in *Calcraft v. Earl of Harborough* (1831) 4 Car. & P. 499, 502, where he said: "Looking also at the conduct of the defendant, for it is for you to say what damages under such circumstances the husband is entitled to." Thus it will be seen that such things as treachery, deliberation, and wanton attack on [141] family honor are deemed to be proper subjects for a jury's attention.

Still more cogently is it seen that the conduct of the defendant is deemed to be a vital matter when I recall the numerous decisions which indicate that it is most important on the question of damages, as of costs, to ascertain whether or not the defendant knew that the woman he carnally possessed was married. I will refer to these decisions later.

This head of conduct is peculiarly important by reason of the fact that it would seem, at the first view, that the actual injury to a husband may oftentimes be the same whether the adulterer knew or did not know that the woman was married. But if the conduct of a defendant as above stated be important, then it ought to follow as a matter of juristic logic that the damages should vary with the conduct. Thus, if his conduct be marked

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by treachery, wantonness, cruelty, or gross depravity, the damages should be so much the more than if his conduct be free from such circumstances of aggravation.

To give effect, however, to this logical result would be to render the damages punitive or exemplary rather than compensatory. They would vary with the impropriety and gravity of the misconduct.

Now if the rule as to damages is, as already stated, that they are compensatory only, then a method must be found of reconciling the decisions that the defendant's conduct is a vital factor with the decisions that the damages are for compensation only to the person wronged. I confess that the extraordinary conflict of the various authorities has caused me the greatest difficulty. I cannot help feeling that the existing obscurity is largely due to two circumstances. First, that several of the distinguished judges of the past have not always insisted on the fact that damages are to be given as compensation to the husband, rather than to be imposed as a punishment on the adulterer; and, secondly, that the tribunal has been willing, in serious cases, to approve of the award of substantial damages.

The only way of reconciling the curious clash of opinion [142] is, I feel, to recall the two main considerations upon which damages are to be based. They are these: First, the actual value of the wife to the husband; secondly, the proper compensation to the husband for the injury to his feelings, the blow to his marital honor, and the serious hurt to his matrimonial and family life.

I take each head briefly: First, as to the value of the wife. This has two aspects; namely, the pecuniary aspect, and the consortium aspect. The pecuniary aspect (which is generally the least important) depends on the wife's fortune (see *Evans v. Evans and Platts*, L. R. [1899] Prob. 195, 68 L. J. Prob. N. S. 70, 81 L. T. N. S. 60, per Jeune, P.); her assistance in the husband's business (see *Keyse v. Keyse and Maxwell* (1886) L. R. 11 Prob. Div. 100, 55 L. J. Prob. N. S. 54, 34 Week. Rep. 791, 8 Eng. Rul. Cas. 360, per Lord Hannen); her capacity as a housekeeper and her ability generally in the home. The considerations are concisely given in *Sedgwick on Damages* (1913), vol. ii., 9th ed. § 478.

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The consortium aspect is broader and depends on the wife's purity, moral character, and affection, and her general qualities as a wife and mother. This is pointed out in all the old textbooks already cited and also in the modern textbooks on Damages; such as Arnold on Damages, 2d ed. (1919) pp. 226 *et seq.*, and Mayne on Damages, 9th ed. (1919), pp. 584 *et seq.*, where the authorities are well collected and the appropriate considerations are indicated.

Now upon the pecuniary aspect of the value of a wife the adulterer's conduct has but little bearing. This branch of assessment must be decided by the criteria of good sense and experience. See also Sedgwick on Damages (1913) 9th ed. § 478.

But upon the consortium aspect of the matter the corespondent's conduct may have the utmost relevance. For this branch depends, as I have said, upon the purity and general character of the wife. If the wife be of wanton disposition or disloyal instincts, it is obvious that the general value to the husband is so much the less. Thus if it be proved that she thrusts herself upon the corespondent, or lightly yields to his desire, or holds herself out to be a single [143] woman, a conclusion adverse to her general character and therefore to her value will at once be drawn. See per Sir Cresswell Cresswell in *Comyn v. Comyn and Humphreys* (1860) 32 L. J. Prob. N. S. 210, where he said to the jury: "If a woman surrenders herself very readily to a man who takes no pains to obtain her affections, or if you have reason to suppose that she has made the first advances, you are to estimate, as far as you can form an estimate in money, the loss the husband has sustained." If, on the other hand, the corespondent has only gained his wish by assiduous seduction and by practised artifice, it may well be considered that the moral character and general worth of the wife is an asset of value to the husband.

Upon the question of the consortium value of the wife, the corespondent's conduct may, therefore, be important. This view of the matter, although not expressly stated in certain of the later decisions, seems to me to be one of the two main grounds on which the corespondent's conduct is relevant to the assessment of damages. It seems moreover to rest on a sound juristic basis,
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and to be fully consistent with the rule that the damages are compensatory only. I think that this juristic basis was intended by Sir Cresswell Cresswell, in *Cowing v. Cowing and Wollen* (1863) 33 L. J. Prob. N. S. 149, where, after holding that as a general rule evidence of the corespondent's means was inadmissible, he, however, suggested that evidence as to the corespondent's fortune ought to be given where he had used that fortune to seduce the petitioner's wife. The meaning of this suggestion is to be found in the statement by that learned judge to the jury in *Forster v. Forster* (1862) 33 L. J. Prob. N. S. 150, note, where he pointed out that if it required the use of a fortune to seduce a wife, it would indicate that she was not lightly to be won, and would, therefore, indicate her greater value to a husband, as compared with a wife who yielded to the first suggestion of temptation. I think, too, that this juristic basis was intended by Lord Hannen, in *Keyse v. Keyse and Maxwell* (1886) L. R. 11 Prob. Div. 100, 101, 8 Eng. Rul. Cas. 360, where he said to the jury: "If he (the [144] corespondent) did not seduce her away from her husband that makes a very material difference in considering the amount of damages to be given." The same juristic basis was clearly recognized by Lord Hannen in the case of *Darbshire v. Darbshire* (1890) 62 L. T. N. S. 664, where he said to the jury: "If a man's wife goes and walks the streets, the husband is not entitled to come here and recover damages against any man who goes and consorts with that woman." So, too, in *Watson v. Watson and Watts* (1905) 21 Times L. R. 320, Barnes, P., pointed out to the jury that if the corespondent did not know that the woman was married, and she held herself out to commit adultery, the damages should be reduced to next to nothing, because she was of no value to the husband. The general conduct of the corespondent, therefore, may give a most direct aid to the ascertainment of the value of the wife. I shall briefly touch on this point again when I deal with the question as to whether or not damages should be awarded against a corespondent who was unaware that the woman was married.

I must here point out that when a husband claims damages he puts in issue the whole character, conduct, and value of the wife. See Selwyn's *Nisi Prius* (1849), 11th ed. p. 26.

Now the second main head on which the husband can claim damages is, as I have pointed out, the injury to his feelings and the like. This, in cases where damages are legitimately claimed, is usually the graver of the two heads. The importance of it is rightly indicated in all the textbooks and in the majority of the decisions. In *Willon v. Webster* (1835) 7 Car. & P. 198, 202, Coleridge, J., refers to the "shock to the feelings" of the husband. In *Evans v. Evans and Platts*, L. R. [1899] Prob. 195, 198, 199, 68 L. J. Prob. N. S. 70, 81 L. T. N. S. 60, Jeune, P., graphically describes the usual consequence of adultery.

With respect to this head it is clear that the conduct of the corespondent is of the greatest importance. The blow to the husband and the shock to his feelings clearly depend to a large extent on the conduct of the corespondent. It therefore follows that any feature of treachery, any grossness of betrayal, any wantonness of insult, and the like [145] circumstances may add deeply to the husband's sense of injury and wrong, and, therefore, call for a larger measure of compensation.

This fact itself suffices to account for the weight attached in all the old textbooks and in all decisions, both old and modern, to the gravity or otherwise of the corespondent's conduct. It accounts to a large extent, moreover, for the importance attached to the question whether or not the corespondent knew that the woman was married. Thus it will be seen that the general conduct of the adulterer is important and relevant only so far as it bears (a) on the value of the wife; and (b) on the extent to which the husband's feelings and pride have been injured by it. This principle falls into line, therefore, with the principle that the damages are compensatory, and not punitive, and with the further principle that the court does not sit to punish mere immorality. The observations of Barnes, J., in *Lord v. Lord and Lambert*, L. R. [1900] Prob. 297, 300, 69 L. J. Prob. N. S. 54, must, I venture most respectfully to think, be read in the light of the principles I have humbly endeavored to state.

In passing to the next point which arises, I desire to say that in assessing damages to the husband it seems to be essential that his whole character and conduct and affection should be tested.
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These matters bear directly not only on the value of the wife, but also upon the question of any shock to his feelings which he may assert to have been caused by the adultery. The character and conduct of the husband is as fully in issue as the character and conduct of the wife. This is clear from the authorities collected in *Arnold on Damages* (1919) 2d ed. pp. 227-8, and *Mayne on Damages* (1909), 8th ed. p. 584. Hence the importance of careful investigation whenever a claim to damages is made. It is obvious, e. g., that the husband's own negligence, or harshness of language or cruelty may have destroyed the affection of his wife or sapped her matrimonial fidelity.

I now desire to consider whether or not the court or a jury in assessing damages are entitled to consider the fortune [146] or financial position of the corespondent. This is a question of great practical importance. Several counsel have argued that the pecuniary standing of an adulterer is wholly and always devoid of relevance. After careful inquiry into the authorities I take the contrary view. I find upon this point an apparent conflict of a serious nature between the old and the modern authorities. I use the word "apparent" advisedly. I take the old authorities first. In *Blackstone's Commentaries* (1787), 10th ed. vol. iii., 140, it is said that damages "are properly increased and diminished by circumstances, as the rank and fortune of the plaintiff and defendant." So, too, in *Buller's Nisi Prius* (1817), 7th ed. p. 26 (b), amongst the considerations as to damages are mentioned; "the condition of the defendant, his being a friend, relative, or dependent of the plaintiff, or being a man of substance." Similar statements appear in *Tidd's Practice* (1828), 9th ed. p. 883, and in *Selwyn's Nisi Prius* (1849), 11th ed. p. 26. Still more striking is the summing up of Sir *Cresswell Cresswell* in the famous case of *Bell v. Bell and Marquis of Anglesey* (1859) 1 Swabey & T. 565, 566. There he said to the jury: "You have then to consider the position of the parties, the terms on which husband and wife lived together before her adultery broke off their cohabitation, the circumstances under which the adulterer was introduced, and the means he has to pay the damages you may assess." Large damages were awarded against the *Marquis of Anglesey*. . . .

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It is clear beyond doubt that up to 1834 evidence was habitually adduced in actions for criminal conversation not only as to the correspondent's social position, but also as to his apparent fortune. In that year, however, the case of *James v. Biddington* (1834) 6 Car. & P. 589, was tried before Alderson, B. In the course of the case the learned Baron (after admitting that the practice had been as I have stated) rejected evidence as to specific property possessed by the correspondent and added: "The amount of the correspondent's means is not a question in the cause." This is the decision which first clearly suggested that the damages awarded to a husband [147] were not punitive, but compensatory. It is also the decision which has led to the grave existing doubt as to the relevance of the correspondent's means. This *dictum* of Alderson, B., has been apparently adopted by judges for the last thirty years, with the result that it has been constantly stated that the financial position of the adulterer has no bearing on the question of damages. Thus in *Keyse v. Keyse and Maxwell* (1886) L. R. 11 Prob. Div. 100, 102, 55 L. J. Prob. N. S. 54, 34 Week. Rep. 791, 8 Eng. Rul. Cas. 360, Lord Hannen told the jury that "the means of the correspondent had nothing to do with the question." In *Darbishire v. Darbishire* (1890) 62 L. T. N. S. 664, 54 J. P. 408, the same learned judge said: "The correspondent's means must be left entirely out of the question." So, too, in *Bikker v. Bikker* (1892) 67 L. T. N. S. 721, 1 Reports, 496, Jeune, P., said that the "means of the correspondent are irrelevant." How, then, are the old authorities and practice to be reconciled with the modern decisions? It seems to me that the apparent conflict has arisen through confusing two distinct things,—namely, the mere existence and extent of the correspondent's fortune, as distinguished from the mode in which he has employed it or allowed it to operate in connection with the seduction of the wife. Let me assume that the jury have decided on a proper amount as a compensation to the husband (a) for his pecuniary loss, and (b) for the injury to his feelings and family life. In such a case the damages, as a matter of strict law, should be neither greater nor less as the correspondent happens to be a rich man or a poor man. A poor man cannot by the idea of poverty escape for

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the actual injury he has caused. A rich man should not, merely because he is a rich man, be compelled to pay more than a proper compensation to the husband. This follows from the rule that the damages are not punitive, but compensatory. The cogent passage in *Mayne on Damages* (1909), 8th ed. p. 53,² cannot prevail in view of the present state of the authorities. His suggestion that the penalty should be proportioned to the means of the offender was based on the opposite assumption.

But even though the fortune of the adulterer is, merely of itself, immaterial, it by no means follows that the mode [148] in which that fortune is employed is equally immaterial. On the contrary, I conceive that it may have the most direct bearing on the question of damages. First, because it may assist in ascertaining the value of the wife; and, secondly, because the mode in which the adulterer may employ his fortune in seducing the wife may greatly accentuate the outrage to the husband's feelings and the blow to his honor and family pride. The mode in which a corespondent has used his wealth forms a part of his conduct, and that conduct may aggravate the injury to the husband. I conceive that this is the true explanation of the passages I have referred to in *Blackstone*, *Buller*, *Tidd*, and *Selwyn*. Nor do I think that the law as I have ventured to state it is really opposed to the *dicta* of Lord Hannen and Sir Francis Jeune already cited. I feel that they meant to say only that when once the proper amount of damages is reached it should not be diminished or increased by the poverty or the wealth of the adulterer.

To illustrate the bearing of the corespondent's fortune or conduct upon the injury to the husband's feelings, let me take the case of a man who deliberately seduces a previously virtuous wife by the gift of large sums of money or of costly jewels or clothes. Here the blow to the husband is great and differs much from the case where a man of small means has been led, by the artifices of the wife, into an illicit intimacy with her. Surely the injury to the husband would be greater in the former case than in the latter. I cannot help thinking that Sir Cresswell Cresswell was right when, in *Forster v. Forster* (1862) 33 L. P. Prob. N. S. 150, note, he pointed out to the jury that if it required the use of

² Omitted in 9th ed., 1920.

a fortune to seduce a wife, it would indicate that she was not lightly to be won, and would therefore indicate her greater value to a husband, as compared with a wife who yielded to the first suggestion of temptation. I think he might correctly have added that the use of a fortune may, in many cases, accentuate the outrage on a husband's feelings.

It is impossible to sever the question of a corespondent's fortune from that of his rank or social position. The two [149] things stand, I think, together. In practically every authority the social position of the adulterer is treated as a relevant and sometimes as an important factor. This is so from the Treatise of Blackstone down to the present day. Thus Blackstone (1787), 10th ed. vol. iii. p. 140, mentions the "rank and fortune of the plaintiff and defendant" as material circumstances; whilst Sir Henry Duke, P., in *Burne v. Burne and Hel-roet*, L. R. [1920] Prob. 17, 89 L. J. Prob. N. S. 18, 122 L. T. N. S. 224, [1919] W. N. 323, 64 Sol. Jo. 132, says: "Common sense tells me that I must bear in mind the general position and obligations of the parties." The only exception appears to be *Bikker v. Bikker* (1892) 67 L. T. N. S. 721, 1 Reports, 496, where Jeune, P., appears to have asked the jury to disregard both the means and "the position in life" of the corespondent. But if the social position of the adulterer be material, why not his fortune? The one is usually closely allied to the other. Both aspects of the matter are illustrated by the case of *Bell v. Bell and Marquis of Anglesey* (1859) 1 Swabey & T. 565. There Sir Cresswell Cresswell (in his summing up to the jury), after referring to the position of the parties and the fortune of the corespondent, added: "On the other hand, you have the Marquis taking advantage perhaps of the prestige of his rank in making a vain woman false to her duty to her husband." In my opinion both the rank and the fortune of the corespondent are relevant for consideration in so far as either may give assistance in ascertaining the value of the wife or measuring the extent of the injury inflicted on the husband.

If, however, neither rank nor fortune have effected in any way the seduction of the wife, then they should, I presume, be deemed irrelevant. This, I conceive, explains the *dictum* above cited of
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Jeune, P., in *Bikker v. Bikker*, *supra*. It is consistent, I hope, with the rule which rejects evidence of specific means possessed by the adulterer. This latter rule was first established by Alderson, B., in *James v. Biddington* (1834) 6 Car. & P. 589. It was recently recognized by Sir Henry Duke, P., in *Burne v. Burne and Helvoet*, *supra*, where he said: "It is clear that I must not receive evidence of particular means or profits of the correspondent." The rule laid down by Alderson, B., and [150] now adopted, is perhaps convenient, inasmuch as an opposite practice might involve a considerable body of evidence in many cases, to the waste of time and to risk of much irrelevance. General evidence can only, I conceive, be given as to the correspondent's fortune, and such evidence is restricted to cases where his means or assets may bear upon the value of the wife or the circumstances of seduction and the consequent injury to the husband. I may mention that in several of the states of North America, *e. g.*, in Illinois (where the damages in an action for criminal conversation are regarded as punitive), a different rule prevails, and evidence both general and specific may be offered as to the correspondent's fortune. See *e. g.*, *Peters v. Lake* (1872) 66 Ill. 206, 16 Am. Rep. 593.

I now come to the question of whether or no damages should be given against a correspondent for adultery with a woman not known to be married. That such damages may in strict law be given seems clear, provided that the husband can show some injury. This follows from the principle that in the old actions for criminal conversation it was not necessary to prove or even allege that the correspondent knew the woman to be married. See Chitty on Pleading (1844), 7th ed. pp. 484, 653; see also *Calcraft v. Earl of Harborough* (1831) 4 Car. & P. 499, 501; *Lord v. Lord and Lambert*, L. R. [1900] Prob. 297, 69 L. J. Prob. N. S. 54. It ought, therefore, to have followed, I think, that the onus rested on the correspondent to prove as a matter of mitigation that he did not know that the woman was married, rather than on the petitioner to prove that the correspondent possessed such knowledge. But here again, for some reason which I do not follow, it has been continually held in recent years that the husband (if he desires to claim damages on the footing that

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the adulterer had knowledge) must prove such knowledge affirmatively. This rule was strongly stated by Barnes, J., in *Lord v. Lord and Lambert*, *supra*, and is now the established rule of the Divorce Court. By cogent analogy it is, of course, supported by the rule that costs are not given against a corespondent unless the petitioner proves knowledge against him.

[151] Assuming, then, that as a matter of strict law damages other than nominal can be given against a corespondent who is wholly without knowledge, the question arises whether as a matter of sound practice and good sense such damages ought to be given. In my opinion the answer is, No. To answer otherwise would produce the extraordinary result that damages—*i. e.*, the substantial matter—would be given against the corespondent, whilst costs, which should be ancillary to and generally dependent on damages, would, in accordance with the practice of the court, be refused. This result is opposed, I think, not only to good sense, but also to sound juristic principles. The question of damages against a corespondent without knowledge cannot, without a grave measure of confusion and inconsistency, be severed from the question of costs in such a case. I will hereafter refer specifically to the question of costs.

My view that damages should not be awarded against a corespondent wholly without knowledge that the woman is married seems to be supported by strong authority. In *Darbishire v. Darbishire* (1890) 62 L. T. N. S. 664, Lord Hannen, after stating that damages are compensatory only, said: "If the man does not know that the woman with whom he commits adultery is a married woman, then he is not consciously committing wrong to any man, and is not liable in damages; and so far is that doctrine carried that this court never even gives costs against a corespondent who is proved not to have known that the woman was married, because he is only the unconscious instrument with which the wife carries out her wrong against her husband." This is an emphatic statement, and still more emphatic is the language in *Newby v. Newby and White* (1897) 77 L. T. N. S. 142. There a corespondent did not, in his first intimacy, know that the woman was married, but afterwards acquired such knowledge and continued the adultery. In that case a counsel of great experience

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argued: "I cannot get damages, yet I ask for costs." The judgment of Jeune, P., is given in four lines: "The law is, to my mind, quite clear. The corespondent cannot be condemned in costs any more than [152] he could be ordered to pay damages. There will be a decree nisi, but no costs."

Such appears to have been the established view of the Divorce Court down to *Lord v. Lord and Lambert*, *supra*, and until this case I can find no reported decision at all which disturbs the rule. I think that *Lord v. Lord and Lambert* requires careful consideration. It has often been quoted as an authority for the proposition not only that damages may in law be given against a corespondent without knowledge, but also that such damages are in accordance with the practice of the court. I cannot agree to this view. It is to be observed that in *Lord v. Lord and Lambert* the corespondent did not concede his liability to pay damages, but offered as a matter of grace to pay 100*l.* on account of any expenses which the petitioner had been put to and which would not be allowed on taxation of costs. The jury accordingly assessed the damages at 100*l.* only, and gave nothing more than the amount which the corespondent had offered to pay. Barnes, J., refused to give costs against him. The summing up of Barnes, J., in that case, is unusual. He adopts a great part of the language of Lord Hannen in *Darbishire v. Darbishire*, *supra* (but without referring to that decision), yet he quite omits that part of Lord Hannen's language which pointed out to the jury that damages should not be given against a corespondent without knowledge. In so doing he also overlooked the view of Jeune, P., in *Newby v. Newby and White*, *supra*. In *Watson v. Watson* (1905) 21 Times L. R. 320, however, Barnes, P., seems to have supplied the observations which he had omitted in *Lord v. Lord and Lambert*. I may say that in *Venables v. Venables and Wheeler* (1916) 114 L. T. N. S. 566, 32 Times L. R. 330, the attention of Horridge, J., who acted on his view of *Lord v. Lord and Lambert*, was not called to the circumstances of that case, or to the other decisions I have mentioned. The damages in that case were, of course, assessed by the jury, and not by the judge. I am not aware of any case in which a judge [153] sitting without a jury has given damages against a corespondent wholly with-

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out knowledge. I therefore humbly venture to think that the practice of a judge should be not to award damages against a corespondent who is without knowledge. The main reasons may be stated as follows: First, because of the strong balance of authority; secondly, because damages in such a case may well savor of mere punishment for ordinary immorality; thirdly, because a wife who for the purposes of adultery passes herself off as a single woman may well be deemed valueless; fourthly, the grant of damages in such a case would be gravely and regrettably inconsistent with the established rule that costs are not given against a corespondent wholly without knowledge. If a man's conduct does not call for the minor burden of costs, I do not see how it can call for the major burden of damages.

In suggesting the above practice I desire to point out that a great distinction may well be drawn between cases where the corespondent has been without knowledge at the time of each of the adulteries alleged, and cases where, though without knowledge at the commencement of his adulterous intercourse, he yet continues that intercourse after knowledge that the woman was married.

This distinction is also of importance in considering the question of costs. In *Sweeting v. Sweeting and Rowlands* (1919) 36 Times L. R. 15, Shearman, J., gave 50l. damages against the adulterer, who continued his intimacy after knowledge. Incidentally I may observe that the judge took into account the position and (undoubtedly, therefore) the means of the corespondent in assessing damages. But he refused to give costs against him. I offer no comment on this case, except to say that it illustrates the unfortunate result (which Shearman, J., regretted) of having one rule as to damages and another rule as to costs; for damages were apparently given against the corespondent in *Sweeting v. Sweeting and Rowlands*, *supra*, because he did not desert the woman upon discovering that she was married, whilst costs were refused against him because he could not properly be expected to desert her, and therefore [154] should not be ordered to pay costs within the broad rule laid down by Sir Francis Jeune in *Bilby v. Bilby and Harrop*, L. R. [1902] Prob. 8, 71 L. J. Prob. N. S. 31, 86 L. T. N. S. 123. For it can scarcely be thought that

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Shearman, J., gave damages in respect of the adultery which was without knowledge, whilst withholding damages in respect of the adultery which was with knowledge. If the case is not one for costs, surely it cannot be one for damages.

In the important case of *Burne v. Burne and Helvoet*, L. R. [1920] Prob. p. 17, 89 L. J. Prob. N. S. 18, 122 L. T. N. S. 224, [1919] W. N. 323, 64 Sol. Jo. 132, before Sir Henry Duke, P., the corespondent committed misconduct at first without knowledge. The petitioner forgave his wife for that misconduct. Thereafter, however, the corespondent, with full knowledge, committed adultery again under discreditable circumstances. Hence Sir Henry Duke awarded substantial damages and also costs against the corespondent for the reasons given in his cogent judgment.

These two decisions seem consistent with the general rule I have ventured to suggest,—namely, that no damages should be awarded by a judge against a corespondent without knowledge. The verdict of a jury as to damages may sometimes be inconsistent with the view of a judge as to costs. But a judge who sits to deal with damages and costs alike will usually seek to avoid inconsistency.

The final point I desire to deal with is the question of costs against a corespondent. This matter, as I have already pointed out, is clearly associated with many aspects of the question of damages.

Under § 34 of the Matrimonial Causes Act 1857, the matter of costs against a corespondent is within the discretion of the court. Within a short time after the passing of the act the question of costs arose in a case where the corespondent was without knowledge that the woman was married. This was the case of *Teagle v. Teagle and Nottingham* (1858) 1 Swabey & T. 188, 27 L. J. Prob. N. S. 55, 6 Week. Rep. 736, heard before a strong court consisting of Cockburn, C.J., and Wightman and Cresswell, JJ. The court ruled that as the petitioner had not proved knowledge against the corespondent, no costs should be given against the latter. This decision [155] is basic. It is the foundation of all the later practice of the court upon the point. It clearly established, in my opinion, two things: First, that the

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onus of proving knowledge rested on the petitioner; secondly, that the court did not sit to punish mere immorality.

As to the first, I beg most respectfully to say that in my view the decision was perhaps unfortunate. The onus of disproving knowledge might well have been placed on the adulterer. To place the onus of proving knowledge on the petitioner was to put upon him a burden which in many cases could clearly not be met.

As to the second, I beg again to say that without imposing the burden of damages upon an adulterer without knowledge, it might well have been held that the man whose act caused the petitioner to seek a dissolution should pay the costs of the appropriate proceedings. But it is too late to question the decision of that distinguished court. It has created the practice of the Divorce Court on the matter. See the practice stated per Hill, J., in *Norris v. Norris and Smith*, L. R. [1918] Prob. 129, 130, 87 L. J. Prob. N. S. 119, 118 L. T. N. S. 507, 34 Times L. R. 224, 62 Sol. Jo. 585.

Teagle v. Teagle and Nottingham, *supra*, was followed in 1860 by another strong court (namely, Sir Cresswell Cresswell, Channell, B., and Keating, J.) in *Priske v. Priske and Goldby* (1860) 4 Swabey & T. 238, where Keating, J., stated the rule to be a strict one. Apparently the rule was followed without challenge until 1889, and was applied even to cases where an intimacy commenced without knowledge was continued after knowledge. But in 1889 the case of *Learmouth v. Learmouth and Austin* (1889) 62 L. T. N. S. 608, 59 L. J. Prob. N. S. 14, came before Butt, J. There the correspondent formed an intimacy with the woman, not knowing that she was married. Afterwards he learned that she was a wife, and yet continued the intimacy. Butt, J., said that in such a case the adulterer should as a general rule be ordered to pay the costs, but on the special facts he gave no costs against the correspondent. The learned judge doubted *Priske v. Priske and Goldby*, *supra*. But apparently he failed to observe that that case was decided [156] by three judges, and that it was in full consonance with the earlier and weighty case of *Teagle v. Teagle and Nottingham*, *supra*. The true ground for Butt, J., to take, was, I conceive, that in *Learmouth v. Learmouth and Austin*, *supra*, the adulterer did commit misconduct

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with knowledge, although his earlier intimacy was without knowledge. Hence the facts were clearly distinguishable from those in *Teagle v. Teagle and Nottingham*, and *Priske v. Priske and Goldby*, *supra*. Now, *Learmouth v. Learmouth and Austin* marked the beginning of a line of cases which, though perhaps consistent with *Teagle v. Teagle and Nottingham*, and with the wide discretion of the court under § 34, are not wholly consistent with each other.

The central decision for consideration is *Bilby v. Bilby and Harrop*, *supra*, where Jeune, P., said: "The rule laid down by my predecessors is fair and proper enough, that where a corespondent has found out, when too late to repair the wrong done, that the woman with whom he has taken up is a married woman, he ought not, because he does not then desert her, to be held liable for costs." This, it will be observed, is a broad modification of the general rule as to costs suggested by Butt, J., in *Learmouth v. Learmouth and Austin*, with regard to a corespondent with knowledge. I conceive that this modification, with which I venture to fully agree, applies to cases where, before knowledge, the corespondent has taken up abode with the wife, or where the wife has become dependent upon him, or where the circumstances are such that a fair-minded man would say that the corespondent ought not to abandon or desert the woman. It is always important to know whether the husband was willing to take her back or not.

Each such case depends on the special circumstances, and must be dealt with on the merits. See Barnes, P., in *Robinson v. Robinson*, L. R. [1919] Prob. 352, 88 L. J. Prob. N. S. 126, 35 Times L. R. 637, 63 Sol. Jo. 705. Where the circumstances I have mentioned do not exist, then costs will usually be given against [157] the corespondent with knowledge, in spite of the fact that an earlier intimacy took place in ignorance that the woman was married. This statement is, it is true, opposed to the observations of Sir Francis Jeune in *Newby v. Newby and White* (1897) 77 L. T. N. S. 142, but it is agreeable to the actual decision of the same judge in *Bilby v. Bilby and Harrop*, *supra*; and it is, moreover, in full conformity with the judgment of Hill, J., in *Norris v. Norris and Smith*, L. R. [1918] Prob. 10 B. R. C.

129, 87 L. J. Prob. N. S. 119, 118 L. T. N. S. 507, 34 Times L. R. 224, 62 Sol. Jo. 585, and with the weighty decision of Sir Henry Duke, P., in *Burne v. Burne and Helvoet*, L. R. [1920] Prob. 17, 89 L. J. Prob. N. S. 18, 122 L. T. N. S. 224, [1919] W. N. 323, 64 Sol. Jo. 132.

Such are the views which I venture, with the utmost diffidence, to express upon the important points of law and practice which have arisen before me.

I desire to add one further observation only, on the question of damages. The temptation is sometimes strong to make them punitive. They may easily become excessive. I conceive that moderation rather than undue severity should be the principle. I think that Shearman, J., was right as a matter of good sense (if not of strict law) when in *Sweeting v. Sweeting and Rowlands* (1919) 36 Times L. R. 15, he took into account, in assessing damages at 50*l.* only, the fact that the corespondent was but a petty officer in the Navy. I desire to express my respectful concurrence with the words of the President (Sir Henry Duke) in *Burne v. Burne and Helvoet*, L. R. [1920] Prob. pp. 17, 19, where he said: "Common sense tells me that I must bear in mind the general position and obligations of the parties, and make an award which it will be possible for the corespondent to meet, and which will not defeat its own object." Those words are robust good sense.

The learned judge then, without going further into the facts of each case, dealt with the costs and damages in each separately.

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Note.—Damages recoverable for criminal conversation or alienation of affections.

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I. Measure of damages and elements.

a. Generally.

From the nature of actions for crim. con. and alienation of affections the courts recognize the impossibility of fixing any set and definite rules for determining the amount of the damages. It is proposed in this section to give a few general statements as to the damages recoverable, both in actions for alienation of affections and crim. con., and in subsequent sections to deal with the separate elements.

It has been held that the measure of damages in an action for alienation of affections of a husband is such damages as the jury believe will reasonably compensate the plaintiff for the injury to her feelings, for the loss of her husband's comfort and society, and for the loss of his support. *Lupton v. Underwood* (1912) 3 Boyce (Del.) 519, 85 Atl. 965.

And in *Waldron v. Waldron* (1890) 45 Fed. 315, reversed on other grounds in (1895) 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. Rep. 383, the grounds of damages in an action for alienation of a husband's affections, and debauching him, was held the injury to the plaintiff's feelings, the loss of her husband's support, his affections, his aid, society, and companionship, caused by defendant's wrongful act.

And in *O'Gorman v. Pfeiffer* (1911) 145 App. Div. 237, 130 N. Y. Supp. 77, it was held that the gist of the action for alienation of a husband's affections is the loss of consortium, and that damages may be recovered for loss of society, affection, companionship, and support; but it was held that the fact that the husband made his will in favor of the defendant was not an element of damages, as plaintiff's marital rights did not include the right to have her husband make his will in her favor.

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And in *Gregg v. Gregg* (1905) 37 Ind. App. 210, 75 N. E. 674, it was held that loss of services is one of the elements of damages in actions for alienation of a husband's affections.

It has been held in an action for alienation of a wife's affections that the plaintiff is entitled to recover such an amount as will compensate him for the loss of his wife's services, and marital consortium, less the value of the husband's duty to support, clothe, cherish, and care for her. *Prettyman v. Williamson* (1898) 1 Penn. (Del.) 224, 39 Atl. 731.

And in *Cottle v. Johnson* (1920) 179 N. C. 426, 102 S. E. 769, it was held that damages in an action for alienation of a wife's affections include loss of the wife's society and loss of her affection and assistance, as well as for plaintiff's humiliation and mental anguish.

But it has been held that a husband is entitled, in an action against his wife's father for alienation of her affections, to recover only for the natural and probable consequences of his act, and that damages cannot be recovered against him on account of an abortion performed on the wife, where there was no evidence that the father was connected with the operation. *Lane v. Spence* (1903) 70 Neb. 204, 97 N. W. 299.

In a Canadian case, in an action for alienation of a wife's affections, it was held that substantial damages might be awarded in respect of the disgrace and humiliation which the defendant, by his illegal and clandestine acts, has brought upon the plaintiff, and for the deprivation of the comfort and society of a wife with whom he had lived happily for a long time. *Hart v. Shorey* (1897) Rap. Jud. Quebec 12 C. S. 84.

In actions for criminal conversation it is held that a husband is entitled to recover substantial damages from the one who has committed adultery with his wife, although he proves no resulting expense, or loss of services. *Shannon v. Swanson* (1904) 208 Ill. 52, 69 N. E. 869.

And in *Long v. Booe* (1894) 106 Ala. 570, 17 So. 716, it was held that where the defendant had committed adultery with the plaintiff's wife the law presumed the loss of consortium, and that it is not necessary to prove actual loss of her society or assistance.

It has been held that in an action for crim. con., the plaintiff is entitled to damages for the dishonor to his marriage bed, destruction of his domestic comfort, suspicion of legitimacy of the offspring, loss of consortium, invasion of his exclusive marital rights and privileges, mental suffering, injured feelings, humiliation, shame, and mortification, caused by defendant's tortious acts. *Powell v. Strickland* (1913) 163 N. C. 393, 79 S. E. 872, Ann. Cas. 1915B, 709.

And in *Prettyman v. Williamson* (1898) 1 Penn. (Del.) 224, 39 10 B. R. C.

Atl. 731, in an action for crim. con., the plaintiff was held entitled to recover such amount as would compensate him for his mental suffering; the loss of the affection of the wife, and the comfort of her society, as well as the pecuniary loss of her services.

In the reported case (*BUTTERWORTH v. BUTTERWORTH*, *ante*, 352) it was decided that a wife's value has two aspects,—pecuniary, depending on her fortune and ability and assistance in the home or business; and consortium, depending on her character and abilities as wife or mother.

It has been held that damages should not be confined to nominal damages in an action for crim. con. simply because the parties were uneducated, and the husband spoke roughly to his wife, and their attachment for one another was mostly physical. *Ruby v. Lawson* (1918) 182 Iowa, 1156, 116 N. W. 481.

In an action for alienation of a husband's affections and crim. con., the jury may, in estimating the damages, consider the effect produced upon the plaintiff by the existence of the relations between the defendant and plaintiff's husband as they appeared to her at the time. *Frederick v. Morse* (1914) 88 Vt. 126, 92 Atl. 16.

In *Yundt v. Hartrunft* (1866) 41 Ill. 9, it was held that an action for crim. con. does not proceed on the theory of a recovery for loss of services of the wife, but for the dishonor of the husband's bed, alienation of the wife's affections, and destruction of the domestic comfort; but that the loss of services might be shown in aggravation of damages.

It has been held that an administrator of the plaintiff in an action for crim. con., who has, by revivor, a right to continue an action, is not limited to a recovery to nominal damages, but is entitled to recover the same as the plaintiff would had he lived. *Milloy v. Wellington* (1907) 9 Ont. Week. Rep. 749.

b. Mental anguish, feelings, family disgrace, as elements.

It is a general rule in actions for alienation of affections that recovery may be had for the mental agony, lacerated feelings, and wounded sensibilities of the injured spouse.

COLORADO.—*French v. Deane* (1894) 19 Colo. 504, 24 L.R.A. 387, 36 Pac. 609; *Williams v. Williams* (1894) 20 Colo. 51, 37 Pac. 614.

CONNECTICUT.—*Noron v. Remington* (1905) 78 Conn. 296, 61 Atl. 963; *Valentine v. Pollack* (1920) 95 Conn. 556, 111 Atl. 869.

KANSAS.—*Nevins v. Nevins* (1904) 68 Kan. 410, 75 Pac. 492.

KENTUCKY.—*Adkins v. Kendrick* (1909) 131 Ky. 779, 115 S. W. 814.

MARYLAND.—*Calus v. Merrieweather* (1904) 98 Md. 361, 103 Am. St. Rep. 404, 57 Atl. 201.

MICHIGAN.—*Rice v. Rice* (1895) 104 Mich. 371, 62 N. W. 833.
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MINNESOTA.—*Spangenberg v. Christian* (1922) — Minn. —, 186 N. W. 700.

MISSOURI.—*Modisett v. McPike* (1881) 74 Mo. 636; *Hartpence v. Rogers* (1898) 143 Mo. 623, 45 S. W. 650; *Linck v. Vorhauer* (1903) 104 Mo. App. 368, 75 S. W. 478.

NEBRASKA.—*Harvey v. Harvey* (1906) 75 Neb. 557, 106 N. W. 660.

It is likewise held in a suit by a wife for crim. con. that damages recoverable include compensation for mental suffering and injury to the injured spouse's feelings.

ALABAMA.—*Long v. Booe* (1894) 106 Ala. 570, 17 So. 716; *Parker v. Newman* (1917) 200 Ala. 103, 75 So. 479.

COLORADO.—*Stark v. Johnson* (1908) 43 Colo. 243, 16 L.R.A. (N.S.) 674, 127 Am. St. Rep. 114, 95 Pac. 930, 15 Ann. Cas. 868.

CONNECTICUT.—*Valentine v. Pollak* (1920) 95 Conn. 556, 111 Atl. 869.

ILLINOIS.—*Browning v. Jones* (1894) 52 Ill. App. 597.

MICHIGAN.—*Johnston v. Disbrow* (1881) 47 Mich. 59, 10 N. W. 79.

NEBRASKA.—*Smith v. Meyers* (1897) 52 Neb. 70, 71 N. W. 1006; *Baker v. Westing* (1918) 102 Neb. 840, 170 N. W. 168.

PENNSYLVANIA.—*Silvernali v. Westerman* (1882) 11 Luzerne Legal Reg. 5.

ENGLAND.—*BUTTERWORTH v. BUTTERWORTH* (reported herewith) *ante*, 352.

It has been held in an action of crim. con. that while the loss of services is the alleged injury, yet the injury to the character of the family, the degradation, and mental anguish, are the real ground of recovery, and that the law does not confine recovery to the precise amount of money which he has proved to have lost, but that a recovery is allowed for injury to family reputation, and anguish. *Yundt v. Hartrunft* (1866) 41 Ill. 9.

And in the reported case (*BUTTERWORTH v. BUTTERWORTH*, *ante*, 352) it was held that hurt to family life was an element of damages.

But it has been held in an action for crim. con. that the husband is not entitled to recover for the injury to the happiness, reputation, and honor of his family. *Ferguson v. Smethers* (1880) 70 Ind. 519, 36 Am. Rep. 186. The court here stated that the family in the case at bar consisted of the parents and seven children, and that injury to these children did not constitute an element of damages to the husband.

And in *Taylor v. Wilcox* (1914) 188 Ill. App. 18, in an action for alienation of a husband's affections, it was held that the plaintiff was entitled to recover for her own injuries, but not for any injury to the good name and character, or for the dishonor of her family.

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c. Loss of affection, social position.

In actions for alienation of affections, loss of affection constitutes a proper element of damages. *Noxon v. Remington* (1905) 78 Conn. 296, 61 Atl. 963; *Harvey v. Harvey* (1906) 75 Neb. 557, 106 N. W. 660.

And the same is true in actions for crim. con. *Smith v. Meyers* (1897) 52 Neb. 70, 71 N. W. 1006; *Baker v. Westing* (1918) 102 Neb. 840, 170 N. W. 168; *Silvernall v. Westerman* (1882) 11 Luzerne Legal Reg. 5.

And in *Matheis v. Mazet* (1894) 164 Pa. 580, 30 Atl. 434, it was held that in fixing the damages in an action for crim. con. the jury were entitled to take into consideration the social relation of the parties, the apparent affection that existed between the husband and wife, and the actual misconduct of the defendant.

And in *Keath v. Shiffer* (1908) 37 Pa. Super. Ct. 573, in an action for alienation of affections, it was held proper for the jury to take into consideration the social relation of the parties, and the apparent affection existing between them before the separation.

d. Support as an element.

In an action for alienation of a husband's affections the measure of damages is the wife's actual loss of support, and also the loss of affection, and the humiliation and disgrace, if any, suffered as a logical result thereof. *Harvey v. Harvey* (1906) 75 Neb. 557, 106 N. W. 660.

And the loss of support of the wife was held an element of damages in *Noxon v. Remington* (1905) 78 Conn. 296, 61 Atl. 963.

And in *Harvey v. Harvey*, *supra*, it was held that, in estimating the amount of the plaintiff's loss of support in an action for alienation of a husband's affections, it is proper for the jury to take into consideration the earning capacity and financial standing of the husband.

And in *Stanley v. Stanley* (1903) 32 Wash. 489, 73 Pac. 596, where the surrounding circumstances and conditions in life of the husband and wife were shown in an action for alienation of the husband's affections, it was held that the jury might consider the loss of support, although there was no evidence of the estimated value thereof in dollars and cents.

Although the usual measure of damages in an action for alienation of a husband's affections is the value of the wife's support and loss of consortium, together with an allowance for mental anguish and injury to her feelings, yet if the defendant's wanton acts cause extra hardship to the plaintiff, as the support of her minor children, by reason of the husband's failure to contribute thereto, she may recover therefor. *Taylor v. Wilcox* (1914) 188 Ill. App. 18.

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In an action for alienation of plaintiff's husband's affections, where the plaintiff showed as a basis of damages the probable annual expenditure required for the support of plaintiff's family in the style in which they had been living, the defendant may show that the plaintiff had an income of her own, and had herself contributed out of her funds toward the payment of the family expenses, since the total cost of such expenses would be unfair as a measure of damages if she had paid a part of them. *Dunham v. McMichael* (1906) 214 Pa. 485, 63 Atl. 1007.

It has been held in an action for alienation of a wife's affections that the value of her services is the true measure of damages, but that deduction should be made on account of the husband's duty to clothe and support her. *Rudd v. Rounds* (1892) 64 Vt. 432, 25 Atl. 438.

But in *Puth v. Zimbleman* (1896) 99 Iowa, 641, 68 N. W. 895, an action for crim. con. and alienation of affections, an instruction directing the jury to allow the plaintiff for the loss, if any, that he has suffered from the loss of affection, society, companionship, or services of his wife, was held not erroneous because it did not mention the plaintiff's duty to clothe, support, and care for her.

e. Wealth of parties an element.

Where punitive damages are allowed in actions for alienation of affections, it is held that the wealth or financial condition of the defendant is a proper element for the jury to consider in fixing the damages. *Taylor v. Wilcox* (1914) 188 Ill. App. 18; *White v. White* (1907) 76 Kan. 82, 90 Pac. 1087; *Audibert v. Michaud* (1920) 119 Me. 295, 111 Atl. 305; *Nichols v. Nichols* (1898) 147 Mo. 387, 48 S. W. 947; *Leavell v. Leavell* (1905) 114 Mo. App. 24, 85 S. W. 55; *Johnson v. Allen* (1888) 100 N. C. 131, 50 S. E. 666; *Miller v. Pearce* (1913) 86 Vt. 322, 43 L.R.A. (N.S.) 332, 85 Atl. 620; *White v. White* (1909) 140 Wis. 538, 133 Am. St. Rep. 1100, 122 N. W. 1051.

In *Leavell v. Leavell* (1905) 114 Mo. App. 24, 85 S. W. 55, in an action for alienation of a husband's affections, it was held that evidence of defendant's wealth was admissible to measure compensatory damages, although there was more than one defendant; but it was held that in such a case evidence of wealth of one of the defendants was not admissible for the purpose of measuring punitive damages.

In some cases punitive damages, in actions for alienation of a husband's affections, are not allowed, and, where this is held, evidence of the defendant's wealth cannot be taken into consideration in fixing damages. *Phillips v. Thomas* (1912) 70 Wash. 533, 42 L.R.A. (N.S.) 582, 127 Pac. 97, Ann. Cas. 1914B, 800.

In actions for criminal conversation, where exemplary damages are allowed, the financial ability of the defendant is held a proper element
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to be considered on this question of damages. *Browning v. Jones* (1893) 52 Ill. App. 597; *Silvernall v. Westerman* (1882) 11 Luzerne Legal. Reg. 5.

And in *Matheis v. Mazet* (1894) 164 Pa. 580, 30 Atl. 434, where recovery was sought for crim. con., it was held that, in fixing punitive damages, the jury should not impose the same amount in case of a poor as of a rich man, since there is a difference in a penalty as between a rich and poor man, as what would be ruinous to the latter would not amount to anything by way of penalty to the former.

And in *Peters v. Lake* (1872) 66 Ill. 206, 16 Am. Rep. 593, in an action for crim. con., the pecuniary ability of the defendant was held a proper subject of inquiry with a view to the question of exemplary damages, and evidence of the poverty of the plaintiff was also held admissible to show the effect of the injury upon the plaintiff.

But the wealth of a corespondent cannot be considered in fixing damages where compensatory damages only are allowed. *Darbishire v. Darbishire* (1890) 62 L. T. N. S. 664; *Burne v. Burne*, L. R. (1920) Prob. 17, 89 L. J. Prob. N. S. 18, 122 L. T. N. S. 224, [1919] W. N. 823, 64 Sol. Jo. 132.

And in *Keyse v. Keyse* (1886) L. R. 11 Prob. Div. 100, 55 L. J. Prob. N. S. 54, 34 Week. Rep. 791, 8 Eng. Rul. Cas. 360, it was held that in an action against a corespondent all that the law permits the jury to do is to give compensation for the loss which the husband has sustained, and that they cannot give damages to punish the defendant, and that the latter's means are not, therefore, to be considered in fixing the damages.

And in *Bikker v. Bikker* (1892) 67 L. T. N. S. 721, it was held that, in fixing damages against a corespondent charged with adultery with petitioner's wife, the position or wealth of the defendant was not to be considered, but that the real question to consider was the injury done to the petitioner.

It is held, however, that although the amount of compensation cannot depend on the wealth or poverty of the corespondent, yet the way in which he has used his wealth in gaining his end is relevant. *Johnson v. Allen* (1888) 100 N. C. 131, 5 S. E. 666; *BUTTERWORTH v. BUTTERWORTH* (reported herewith) ante, 352; *Cowing v. Cowing* (1863) 33 L. J. Prob. N. S. 149; *Forster v. Forster* (1862) 33 L. J. Prob. N. S. 150, note; *James v. Biddington* (1834) 6 Car. & P. 589.

II. Matters in mitigation.

a. Unhappy relations of parties.

In an action for alienation of affections, the actual state of the conjugal affections of the wife should be considered, since, if a feeling of indifference or repugnance on her part preceded the defendant's rela-

tions with her, there can be little or no recovery. *Cutter v. Cooper* (1920) 234 Mass. 307, 125 N. E. 634.

And it is held that the unhappy relations under which a husband and wife lived may be shown in mitigation of damages in an action for alienation of a spouse's affections.

CALIFORNIA.—*Humphrey v. Pope* (1905) 1 Cal. App. 374, 82 Pac. 223.

COLORADO.—*Keeler v. Russum* (1920) 68 Colo. 196, 189 Pac. 255.

DELAWARE.—*Prettyman v. Williamson* (1898) 1 Penn. (Del.) 224, 39 Atl. 731; *Lupton v. Underwood* (1912) 3 Boyce (Del.) 519, 85 Atl. 965.

INDIANA.—*Daywitt v. Daywitt* (1917) 63 Ind. App. 444, 114 N. E. 694.

IOWA.—*Bailey v. Bailey* (1895) 94 Iowa, 598, 63 N. W. 341.

MARYLAND.—*Wolf v. Frank* (1900) 92 Md. 145, 52 L.R.A. 102, 48 Atl. 132; *Annarina v. Boland* (1920) 136 Md. 365, 111 Atl. 84.

MISSOURI.—*Butterfield v. Ennis* (1916) 193 Mo. App. 638, 186 S. W. 1173.

RHODE ISLAND.—*Angell v. Reynolds* (1904) 26 R. I. 160, 106 Am. St. Rep. 707, 58 Atl. 625.

ENGLAND.—*Comyn v. Comyn* (1860) 32 L. J. Prob. N. S. 210; *Keyse v. Keyse* (1886) L. R. 11 Prob. Div. 100, 55 L. J. Prob. N. 54, 34 Week. Rep. 791, 8 Eng. Rul. Cas. 360.

And in *Waldron v. Waldron* (1890) 45 Fed. 315, reversed on other grounds in (1895) 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. Rep. 383, it was held that if, in an action for alienation of a husband's affections and debauching him, it appeared that the domestic relations of husband and wife were unhappy, and that on account of the infelicity of their relations he deserted her without intending to return, and by reason of these things the marital relation was of little value to the plaintiff, very small or nominal damages only should be allowed.

And in *Matteson v. Curtis* (1860) 11 Wis. 425, in an action for alienation of a wife's affections, it was held that it might be shown in mitigation of damages that the affections of the wife had previously been alienated by others, and that the plaintiff had lived in a condition of jealousy and discord with his wife.

And it is held that the unhappy terms upon which the husband and wife lived before the crim. con. for which a recovery is sought are held competent for the purpose of reducing the damages. *Parker v. Newman* (1917) 200 Ala. 103, 75 So. 479; *Cutter v. Cooper* (1920) 234 Mass. 307, 125 N. E. 634; *Joseph v. Naylor* (1917) 257 Pa. 561, 101 Atl. 846; *Lewis v. Roby* (1907) 79 Vt. 487, 118 Am. St. Rep. 984, 65 Atl. 524.

It has been held that the fact that the plaintiff in an action for crim. con., and his wife, were uneducated, and their attachment for
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each other more physical than ethical, may be considered in measuring the damages. *Ruby v. Lawson* (1918) 182 Iowa, 1156, 166 N. W. 481.

And in *Payne v. Williams* (1874) 4 Baxt. (Tenn.) 583, in an action for alienation of a wife's affections by her parents, it was held that the jury might consider, on the question of damages, whether the plaintiff entertained a sincere and honorable love for his wife, and for this reason, and not merely from lustful feelings, desired her to return to him.

The fact that the husband and his wife, at or about the time the defendant is said to have alienated the husband's affections, made charges of adultery and instituted divorce proceedings against one another, is relevant as affecting the question of damages. *Annarina v. Boland* (1920) 136 Md. 365, 111 Atl. 84.

b. Questionable character or conduct of wife.

In assessing damages against a corespondent the jury is to consider what was the value of the wife of whom the petitioner has been deprived. *Cowing v. Cowing* (1863) 33 L. J. Prob. N. S. 149; *Forster v. Forster* (1862) 33 L. J. Prob. N. S. 150, note; *James v. Biddington* (1834) 6 Car. & P. 589.

A wife who passes herself off as a single woman may well be deemed valueless. *BUTTERWORTH v. BUTTERWORTH* (reported herewith) *ante*, 352; *Watson v. Watson* (1905) 21 Times L. R. 320.

And where a wife walks the streets, and is not virtuous, the husband is entitled only to damages commensurate with the loss of such a woman. *Darbishire v. Darbishire* (1890) 62 L. T. N. S. 664.

And the wife's character for chastity before marriage may be shown in mitigation of damages in an action of crim. con. *Sanborn v. Neilson* (1825) 4 N. H. 501.

And this is true although the husband was ignorant of her misconduct. *Ruby v. Lawson* (1918) 182 Iowa, 1156, 166 N. W. 481.

And as affecting the damages in an action for crim. con. it may be shown whether the wife was sought by her paramour, and importuned by him, or whether she sought him, or threw herself in his way. *Ferguson v. Smethers* (1880) 70 Ind. 519, 36 Am. Rep. 186.

And in *Comyn v. Comyn* (1860) 32 L. J. Prob. N. S. 210, it was held that the jury in fixing damages should take into consideration whether the wife surrendered herself readily to the corespondent.

It has been held that the fact that the defendant in an action for crim. con. did not know that the woman with whom he had intercourse was married may go in mitigation of damages. *Darbishire v. Darbishire* (1890) 62 L. T. N. S. 664; *Lord v. Lord*, L. R. [1900] Prob. 297, 69 L. J. Prob. N. S. 54; *Venables v. Venables* (1916) 114 L. T. N. S. 566, 32 Times L. R. 330.

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And in *Watson v. Watson* (1905) 21 Times L. R. 320, where there was no evidence that the defendant knew that the plaintiff's wife was a married woman, and she held herself out to commit adultery as if she were not, it was held that the damages, if any, should be reduced to next to nothing, because she was not a woman whose loss would matter to her husband.

Evidence of misconduct on the part of the wife, in consequence of which a decree of divorce previously granted to her was annulled, is admissible in mitigation of damages, in an action by her for the alienation of her husband's affections. *Annarina v. Boland* (1920) 136 Md. 365, 111 Atl. 84.

It has been held that where the defendant, in an action for crim. con., induced the plaintiff to marry his wife by representing her to be virtuous, he cannot show in mitigation of damages that before her marriage she had intercourse with him. *Stumm v. Hummel* (1874) 39 Iowa, 478.

In *Smith v. Hockenberry* (1906) 146 Mich. 7, 117 Am. St. Rep. 615, 109 N. W. 23, 10 Ann. Cas. 60, evidence in an action of crim. con. that the plaintiff's wife saw the attorney employed by defendant before he did, and that alleged acts of intercourse were brought about by her under circumstances indicating that discovery was expected, was held competent as bearing on her character, and thus affecting the question of damages.

In *Evans v. Evans*, L. R. [1899] Prob. 195, 68 L. J. Prob. N. S. 70, 81 L. T. N. S. 60, where it appeared that for over a year the co-respondent, who was the solicitor of plaintiff's wife, had committed adultery with her, it was held that the plaintiff was entitled to compensatory damages, although because of his wife's violent conduct toward him he had separated from her, the court holding that the jury, in fixing damages, should take into consideration that because of the adultery, a reconciliation between the parties had become impossible.

In *Wolf v. Frank* (1900) 92 Md. 138, 52 L.R.A. 102, 48 Atl. 132, it was held that the fact that the plaintiff, in an action for enticing a husband from his wife, and depriving her of his society, had illicit relations with another man, and that her husband had knowledge thereof, was proper to consider in mitigation of damages.

c. Questionable character or conduct of husband.

In an action of crim. con. the plaintiff's illicit intercourse with a woman other than his wife, after marriage and before trial, is admissible in mitigation of damages. *Phelps v. Bergers* (1913) 92 Neb. 851, 139 N. W. 632; *Sanborn v. Neilson* (1895) 4 N. H. 501; *Silvernoli v. Westerman* (1882) 11 Luzerne Legal Reg. 5; *Shattuck v. Hammond* (1874) 46 Vt. 466, 14 Am. Rep. 631; *BUTTERWORTH v. BUTTERWORTH* (reported herewith) *ante*, 352.

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And in *Allen v. Besecker* (1907) 55 Misc. 366, 105 N. Y. Supp. 416, in an action for debauching plaintiff's wife and alienating her affections it was held that the defendant might show misconduct by the plaintiff, and his lack of love for and mistreatment of his wife.

And in *Browning v. Jones* (1873) 52 Ill. App. 597, an action for crim. con. and desertion, it was held that adulteries, after marriage and before trial, on the part of the husband, together with any gross immoralities and avowal of profligate principles, and loss of affection on the part of the wife, were competent in mitigation of damages.

And in an action for alienation of a wife's affections it has been held that a decree of divorce, obtained by her, might be considered in mitigation of damages. *Prettyman v. Williamson* (1898) 1 Penn. (Del.) 224, 39 Atl. 731; *McNamara v. McAllister* (1911) 150 Iowa, 243, 34 L.R.A. (N.S.) 436, 130 N. W. 26, Ann. Cas. 1912D, 463.

And in *Phillips v. Thomas* (1912) 70 Wash. 533, 42 L.R.A. (N.S.) 582, 127 Pac. 97, Ann. Cas. 1914B, 800, it was held that the fact that the plaintiff in an action for alienation of her husband's affections had been living separate from him, and that he had paid such attention to other women as to indicate little affection for her, might be considered in mitigation of damages.

And in an action for alienation of a husband's affections it was held that the defendant might show that he had had improper relations with other women than the defendant during the same period she was charged with improper relations (*Annarina v. Boland* (1920) 136 Md. 365, 111 Atl. 84); and this whether or not the plaintiff had knowledge of the fact. *Angell v. Reynolds* (1904) 26 R. I. 160, 106 Am. St. Rep. 707, 58 Atl. 625.

And in an action for crim. con. the husband's ill treatment of his wife may be shown in mitigation of damages. *Cross v. Grant* (1883) 62 N. H. 675, 13 Am. St. Rep. 607; *McAlpin v. Baird* (1918) 40 S. D. 180, 166 N. W. 639; *Jenness v. Simpson* (1910) 84 Vt. 127, 78 Atl. 886.

It has been held that, although the actual relations that existed between husband and wife may be shown, yet the defendant, in an action for alienation of a wife's affections, cannot show in mitigation of damages an act of adultery on the part of the plaintiff which had been condoned by his wife. *Sheffield v. Beckwith* (1916) 90 Conn. 93, 96 Atl. 316.

d. Husband's failure to protect wife.

It is held that negligence, or inattention to his wife's conduct with defendant, by the plaintiff in an action for crim. con., may be shown in mitigation of damages. *Silvernall v. Westerman* (1882) 11 Luzerne Legal Reg. 5; *Duberley v. Gunning* (1792) 4 T. R. 652, 100 10 B. R. C.

Eng. Reprint, 1226; *Comyn v. Comyn* (1860) 32 L. J. Prob. N. S. 210.

And where it appeared that the wife of plaintiff in an action for crim. con. was an actress, and that the parties were married secretly, and that she continued to perform under her maiden name, it was held that the jury, in assessing damages, might consider how far the plaintiff interfered to protect his wife from the temptations to which she was exposed, and whether the defendant knew that she was married. *Calcraft v. Harborough* (1831) 4 Car. & P. 499.

And in *Bunnell v. Greathead* (1867) 49 Barb. 106, where the plaintiff in an action for crim. con. saw the defendant and his wife having criminal intercourse and did not interfere to prevent it, it was held that he was only entitled to the actual pecuniary damage which he suffered, and the court stated that no proof of such damage was given and accordingly set aside a substantial verdict.

e. Reconciliation of parties.

In an action of crim. con. the lack of consortium is an element on which damages are estimated, and when this does not appear, or there appears to have been a reconciliation, and only a partial breaking up of the home, or partial destruction of the marital affection, or relation, these elements are properly considered in mitigation of damages. *Rehling v. Brainard* (1914) 38 Nev. 16, 144 Pac. 167, Ann. Cas. 1917C, 656.

And in *Smith v. Hockenberry* (1906) 146 Mich. 7, 117 Am. St. Rep. 615, 109 N. W. 23, 10 Ann. Cas. 60, it was held that the fact that the husband continued to live and cohabit with his wife after her crim. con. with defendant was a circumstance to be considered in mitigation of damages.

III. Time for which damages recoverable.

In an action for alienation of a wife's affections and crim. con. the plaintiff is entitled to damages measured by the permanent loss of consortium, and not measured by such loss to the date of the action. *Jenness v. Simpson* (1911) 84 Vt. 127, 78 Atl. 886.

And recovery may be had by a wife in an action for alienation of her husband's affections subsequent to her bringing an action for separation, where she did not prosecute such action because of her desire to live separate, but because she was unable to learn of his whereabouts. *Wilson v. Coulter* (1898) 29 App. Div. 85, 51 N. Y. Supp. 804.

It has been held that in an action by a wife for alienation of her husband's affections, damages are recoverable not merely for the period elapsing between the date of separation to the date of a di-
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voice obtained by her, but from such separation until the date of the husband's death, time not being of the essence of the plaintiff's right to recover, such right resting upon the wrong done her by the defendant. *Hollinghausen v. Aide* (1921) — Mo. —, 233 S. W. 39.

But where, prior to the trial of an action for alienation, the marriage between plaintiff and her husband has been annulled, damages are confined to those sustained between the time of the alienation, and the decree of annulment. *Wolf v. Wolf* (1920) 111 Misc. 391, 181 N. Y. Supp. 368, reversed on other grounds in (1920) 194 App. Div. 33, 185 N. Y. Supp. 37.

In *Wilton v. Webster* (1835) 7 Car. & P. 198, where it appeared in an action of crim. con. that the plaintiff did not learn of his wife's adultery until she was on her deathbed, and that he treated her kindly until her death twenty days later, it was held that he was entitled to damages for the shock given his feelings, and the loss of the society of his wife down to the time of her death.

In an action against a husband's mother for alienation of affections it has been held not permissible to give damages for insults by the mother before the attempt at the alienation began. *Smith v. Smith* (1918) 192 Mich. 566, 159 N. W. 349.

The fact that illicit intercourse went on long after the correspondent knew that the woman was married, and after she had confessed that she had committed adultery, may be considered in fixing the amount of damages. *Burne v. Burne*, L. R. [1920] Prob. 17, 89 L. J. Prob. N. S. 18, 122 L. T. N. S. 224, [1919] W. N. 323, 64 Sol. Jo. 132.

And in *Long v. Booe* (1894) 106 Ala. 570, 17 So. 716, it was held that continued defilement of plaintiff's wife after she had rejoined her husband was an element to be considered by the jury in assessing damages.

IV. Compensatory or punitive damages.

a. Generally.

In actions for alienation of the affections of a spouse it is held by the weight of authority that where the act was done with malice exemplary damages are recoverable, and that the plaintiff is not limited to compensatory damages.

UNITED STATES.—*Waldron v. Waldron* (1890) 45 Fed. 315, reversed on other grounds in (1895) 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. Rep. 383.

DELAWARE.—*Lupton v. Underwood* (1912) 3 Boyce (Del.) 519, 85 Atl. 965; *Rash v. Pratt* (1920) — Del. —, 111 Atl. 225.

ILLINOIS.—*Taylor v. Wilcox* (1914) 188 Ill. App. 18; *Eshelman* 10 B. R. C.

v. Rawalt (1921) 298 Ill. 192, 16 A.L.R. 1311, 131 N. E. 675;
Gregg v. Gregg (1905) 37 Ind. App. 210, 75 N. E. 674.

KANSAS.—*Nevins v. Nevins* (1904) 68 Kan. 410, 75 Pac. 492;
White v. White (1907) 76 Kan. 82, 90 Pac. 1087.

KENTUCKY.—*Scott v. O'Brien* (1908) 129 Ky. 1, 16 L.R.A. (N.S.)
 742, 130 Am. St. Rep. 419, 110 S. W. 260.

MAINE.—*Jowett v. Wallace* (1917) 112 Me. 389, 92 Atl. 321,
 Ann. Cas. 1917A, 754.

MARYLAND.—*Callis v. Merrieweather* (1904) 98 Me. 361, 103 Am.
 St. Rep. 404, 57 Atl. 201.

MINNESOTA.—*Spangenberg v. Christian* (1922) — Minn. —, 186
 N. W. 700.

MISSOURI.—*Nichols v. Nichols* (1898) 147 Mo. 387, 48 S. W. 947;
Hartpence v. Rogers (1898) 143 Mo. 623, 45 S. W. 650; *Leavell v.*
Leavell (1905) 114 Mo. App. 24, 89 S. W. 55; *De Ford v. Johnson*
 (1915) — Mo. —, 177 S. W. 577; *Butterfield v. Ennis* (1916) 193
 Mo. App. 638, 186 S. W. 1173.

And exemplary damages have also been held recoverable in actions
 for alienation of a wife's affections and for debauching her. *Woldson*
v. Larson (1908) 90 C. C. A. 422, 164 Fed. 548; *Johnson v. Allen*
 (1888) 100 N. C. 131, 5 S. E. 666; *Powell v. Strickland* (1913) 163
 N. C. 393, 79 S. E. 872, Ann. Cas. 1915B, 709; *Cornelius v. Hambay*
 (1892) 150 Pa. 359, 25 Atl. 515.

And in actions for criminal conversation punitive damages are also
 generally recoverable. *Peters v. Lake* (1872) 66 Ill. 206, 16 Am.
 Rep. 593; *Browning v. Jones* (1893) 52 Ill. App. 597; *Wales v. Miner*
 (1883) 89 Ind. 118; *Mills v. Taylor* (1900) 85 Mo. App. 111; *Cor-*
nelius v. Hambay (1892) 150 Pa. 359, 24 Atl. 515; *Matheis v. Mazet*
 (1894) 164 Pa. 580, 30 Atl. 434; *Joseph v. Naylor* (1917) 257 Pa.
 561, 101 Atl. 846.

And punitive damages may likewise be assessed in an action for
 unlawfully persuading plaintiff's wife to refuse to have intercourse
 with him. *Plour v. Jarvis* (1904) 99 Me. 161, 58 Atl. 774.

In *Cottle v. Johnson* (1920) 179 N. C. 426, 102 S. E. 769, it was
 held incumbent on the plaintiff in an action for alienation of the
 affections of his wife to show circumstances of aggravation or malice
 in addition to the malice implied by law, in order to justify the
 awarding of punitive damages.

In *White v. White* (1909) 140 Wis. 538, 133 Am. St. Rep. 1100,
 122 N. W. 1051, which was an action against the parents of plain-
 tiff's husband for alienation of his affections, punitive damages were
 held properly allowed, although one of the defendants was without
 property, and the other was possessed of considerable means.

In England, in the earlier actions for criminal conversation and
 alienation of affections, as well as in cases of similar claims arising
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under the Matrimonial Causes Act, it is held that the damages recoverable are merely compensatory, and that punitive damages cannot be had. *James v. Biddington* (1834) 6 Car. & P. 589; *Wilton v. Webster* (1835) 7 Car. & P. 198; *Keyse v. Keyse* (1886) L. R. 11 Prob. D. 100, 35 L. J. Prob. N. S. 54, 34 Week. Rep. 791, 8 Eng. Rul. Cas. 360; *Evans v. Evans*, L. R. [1899] Prob. 195, 68 L. J. Prob. N. S. 70, 81 L. T. N. S. 60; *Darbishire v. Darbishire* (1890) 62 L. T. N. S. 664; *BUTTERWORTH v. BUTTERWORTH* (reported herewith) *ante*, 352.

And in some of the American cases it has been held that compensatory damages, and not exemplary damages, are recoverable in actions for alienation of affections. *French v. Deane* (1894) 19 Colo. 504, 24 L.R.A. 387, 36 Pac. 609; *Phillips v. Thomas* (1912) 70 Wash. 533, 42 L.R.A.(N.S.) 583, 127 Pac. 97, Ann. Cas. 1914B, 800.

b. Under statutes.

The allowance of punitive damages in crim. con. and alienation of affection cases is regulated by statute in some jurisdictions.

Thus it has been held that a recovery of punitive damages may be had in an action for alienation under a statute authorizing such damages, where the defendant has been guilty of malice, as malice may be implied in such a case. *Moelleur v. Moelleur* (1918) 55 Mont. 30, 173 Pac. 419.

And in *Williams v. Williams* (1894) 20 Colo. 51, 37 Pac. 614, where the action for alienation of affections of a husband arose after the enactment of Sess. Laws 1889, p. 64, restoring exemplary damages, the injury was held a wrong done to the person, and exemplary damages were held recoverable.

In *Lindblom v. Sonstelie* (1901) 10 N. D. 140, 86 N. W. 357, where a statute authorized the assessing of exemplary damages in case the defendant had been guilty of oppression, fraud, or malice, actual or presumed, an instruction, in an action for maliciously alienating the wife's affections, was held erroneous, where it told the jury that they might add such an amount for exemplary damages as they saw fit, since they should have been told that exemplary damages could be allowed only when fraud or malice existed, and that the amount of such damages should be assessed after weighing all of the evidence, both incriminatory and mitigatory.

V. Amount of damages.

It is a general rule that courts will not interfere with the finding of a jury in actions for crim. con. or alienation of affections unless the verdict shows passion or prejudice, since there is no method of
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determining exactly the proper amount of pecuniary compensation. *Puth v. Zimbleman* (1896) 99 Iowa, 641, 68 N. W. 895; *Dorman v. Sabree* (1899) 21 Ky. L. Rep. 634, 52 S. W. 809; *Wentworth v. Gerrish* (1922) — Me. —, 116 Atl. 416; *Love v. Love* (1903) 98 Mo. App. 562, 73 S. W. 255; *McKim v. Beiseker* (1919) 56 Mont. 330, 185 Pac. 153.

In *Spangenberg v. Christian* (1922) — Minn. —, 186 N. W. 700, it is said that "the amount of the damages in actions of this nature cannot be measured by any set standard. It must rest largely in the sound common sense of the jury."

And it has been held that as there is no definite rule to go by in arriving at the measure of damages in an action of crim. con. the court will not set aside a verdict on the ground that it is excessive, even though they think it much larger than should have been given. *Duberley v. Gunning* (1792) 4 T. R. 652, 100 Eng. Reprint, 1226.

In accord with this policy the courts in the following cases refused to set aside as excessive the following verdicts:

—\$600 in an action by a husband for alienation of his wife's affections by another man, *Harringer v. Keenan* (1921) — Wash. —, 201 Pac. 306;

—\$1,750 against a husband's sisters for alienating his affections, where it appeared that they upbraided the husband for marrying, induced him to leave the state, and were guilty of uncivilized conduct toward plaintiff, for the purpose of humiliating her, and took possession of the husband's property, *Wilson v. Coulter* (1898) 29 App. Div. 85, 51 N. Y. Supp. 804;

—\$2,000 against the parents of plaintiff's husband for alienating his affections, *White v. White* (1907) 101 Minn. 451, 112 N. W. 627;

—\$3,000 in an action for alienation of a husband's affections, where it appeared that the husband got plaintiff with child before marriage, married her after bastardy proceedings were brought, and by reason of defendant's solicitations caused her to leave home, *Harvey v. Harvey* (1906) 75 Neb. 557, 106 N. W. 660;

—\$3,000 in an action for alienation of a husband's affections by his mother, where the plaintiff was deprived of her husband, his society, and support, and the support of her child, *Diedrich v. Swift* (1914) 178 Mich. 593, 146 N. W. 170;

—\$4,208 in an action for alienating the affections of, and for criminal conversation with, plaintiff's husband, *Valentine v. Pollak* (1920) 95 Conn. 556, 111 Atl. 869;

—\$4,750 in an action against a husband's parents for alienating his affections, *Melcher v. Melcher* (1918) 102 Neb. 790, 4 A.L.R. 492, 169 N. W. 720;

—\$5,000 in an action against the parent of plaintiff's husband for alienation of affections, there being nothing shown to justify de-

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fendant's conduct in separating the parties, *Nichols v. Nichols* (1898) 147 Mo. 387, 48 S. W. 947;

—\$5,000 in an action against the husband's mother for alienation of affections, where it appeared that her conduct was a studied and a deliberate attempt to belittle plaintiff, and bring about a separation, *Klein v. Klein* (1907) 31 Ky. L. Rep. 28, 101 S. W. 382;

—\$7,500 in an action by an eighteen-year-old girl against her husband's parents for alienation of his affections, *Cochran v. Cochran* (1908) 127 App. Div. 319, 111 N. Y. Supp. 588, reversed on other grounds in (1909) 196 N. Y. 86, 24 L.R.A.(N.S.) 160, 89 N. E. 470, 17 Ann. Cas. 782;

—\$7,888.33 in an action for criminal conversation and alienation of affections of plaintiff's wife, *Wentworth v. Gerrish* (1922) — Me. —, 116 Atl. 416;

—\$12,500 in action against plaintiff's husband's mother for alienation, there being testimony that the defendant induced her son to transfer to her stocks and bonds valued at \$25,000, *Williams v. Williams* (1894) 20 Colo. 51, 37 Pac. 614;

—\$15,000 against the husband's parents for alienating his affections, where it appeared that they wilfully and deliberately conspired to separate the husband and wife, *Lockwood v. Lockwood* (1897) 67 Minn. 476, 70 N. W. 784;

—\$15,000 in an action for alienation of a husband's affections against his father and mother, where they consented to the son's marriage, with the intention of causing the son to leave the plaintiff immediately following the marriage, and, although plaintiff and her husband loved each other, deliberately caused a separation, *Lyen v. Lyen* (1917) 98 Wash. 498, 167 Pac. 1113;

—\$10,000 compensatory damages, and \$5,000 punitive damages, in an action by a common-law wife against her husband's sister and the sister's husband, for alienating her husband's affections and thereafter preventing a reconciliation desired by the parties, although it appeared that, during the pendency of divorce proceedings instituted by the plaintiff, she entered into a written contract with her husband by virtue of which her right to alimony and all her rights as his wife in his estate were fully adjusted and settled for the sum of \$7,500, *Hollinghausen v. Aide* (1921) — Mo. —, 233 S. W. 39;

—\$1,500 in an action for alienation of a wife's affections by a stranger, *Korby v. Chesser* (1906) 98 Minn. 509, 108 N. W. 520;

—\$3,000 in action against a neighbor for alienation of wife's affections and crim. con., *Sullivan v. Valiquette* (1919) 66 Colo. 170, 180 Pac. 91;

—\$3,500 in an action for alienation of a wife's affections, *Jowett v. Wallace* (1914) 112 Me. 389, 92 Atl. 321, Ann. Cas. 1917A, 754;
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—\$3,500 in an action for alienation of a husband's affections, *Stanley v. Stanley* (1903) 32 Wash. 489, 73 Pac. 596;

—\$4,500 for alienating the husband's affections, where it appeared that he was reasonably attentive to his wife and supported his family comfortably while the parties lived together, *Tillinghast v. Sawyer* (1907) — R. I. —, 68 Atl. 478;

—\$5,000 in an action for alienation of the affection of plaintiff's wife, where the transaction was for an immoral purpose, and there was evidence pointing to the probability that the purpose had been accomplished, *Kenworthy v. Richmond* (1917) 95 Wash. 407, 163 Pac. 924;

—\$5,250 for alienation of a wife's affections, where the defendant, a man of means, deliberately set out to take the plaintiff's wife away from him, and up to that time she had been affectionate and above suspicion, *Hartpence v. Rogers* (1898) 143 Mo. 623, 45 S. W. 650;

—\$7,410 in an action for alienation of a wife's affections, where the husband and wife had lived happily for twelve years before defendant appeared, and they had several children, and the wife was a hard-working and businesslike woman, *De Ford v. Johnson* (1915) — Mo. —, 177 S. W. 577;

—\$15,000 in an action for seduction and alienation of the wife's affections, where it appeared that the wife was a school-teacher, that the plaintiff was a lawyer and had been elected prosecuting attorney, and that the relations between husband and wife were cordial and affectionate, prior to defendant's interference, *Speck v. Gray* (1896) 14 Wash. 589, 45 Pac. 143;

—\$1,000 damages in an action for criminal conversation is not excessive, although the wife may have been easily seduced, *Wales v. Miner* (1883) 89 Ind. 118;

—\$1,500 in an action for criminal conversation and alienation of affections, although it appeared that the husband and wife did not live happily, and that the wife was not entirely above suspicion, *Puth v. Zimbleman* (1896) 99 Iowa, 641, 68 N. W. 895;

—\$2,333.33 in an action for persuading and enticing plaintiff's wife to refuse him marital intercourse, the wrong to plaintiff being wilful and grievous, *Plourd v. Jarvis* (1904) 99 Me. 161, 58 Atl. 774;

—\$3,000 in an action for crim. con., *Smith v. Meyers* (1897) 52 Neb. 70, 71 N. W. 1006;

—\$3,000 in action for crim. con., especially where the defendant attempted to exculpate himself from wrongdoing by an affidavit of the wife, for which he had paid her the same sum, *Scheffler v. Robinson* (1911) 159 Mo. App. 529, 141 S. W. 485;

—\$7,000 where the jury must have found that the allegation of criminal conversation was established, and the uncontradicted evi-
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dence showed that the defendant was worth \$150,000, *Audibert v. Michaud* (1920) — Me. —, 111 Atl. 305;

—\$4,000 in an action for crim. con., where the parties had apparently lived happily before, and the defendant by financial inducements obtained the wife's consent to yield her virtue, *Roberts v. Jacobs* (1916) 37 S. D. 27, 156 N. W. 589.

And it has been held that a verdict of \$10,000 in an action for alienation of a wife's affections is not excessive, where it appeared that the plaintiff was a young, honest, and intelligent business man; that he lived happily for ten years with his wife, who was young and attractive; and that the defendant, who was wealthy, used his spare time in alienating plaintiff's wife's affections while plaintiff was at work. *Fuller v. Robinson* (1910) 230 Mo. 22, 130 S. W. 343, Ann. Cas. 1912A, 938.

And in an action against a husband's parents for alienation of his affections a verdict for \$5,000 compensatory and \$1,500 punitive damages is not excessive, where it appeared that they had wrongfully and maliciously intermeddled to separate the parties. *White v. White* (1909) 140 Wis. 538, 133 Am. St. Rep. 1100, 122 N. W. 1051.

In *Spangenberg v. Christian* (1922) — Minn. —, 186 N. W. 700, the court refused to disturb a verdict of \$7,500, to which the trial court had reduced a verdict of \$10,000, returned by the jury in an action by a husband for alienation of his wife's affections by his employer, there being nothing in the record to indicate passion or prejudice.

And in *Jones v. Jones* (1917) 96 Wash. 172, 164 Pac. 757, the court refused to disturb a verdict of \$12,500, to which the trial court had reduced a verdict of \$25,000 returned by the jury in an action against plaintiff's father-in-law for alienating her husband's affections; it appearing that he had consented to his son's marriage to avoid a criminal prosecution against him, and with the ultimate idea of securing a divorce of the parties, and that he was the active agency in keeping the son away from his wife.

And a verdict for \$7,250 was affirmed in *Warnock v. Moore* (1914) 91 Kan. 262, 137 Pac. 959, in an action for alienation of the wife's affections, where it appeared that the defendant, who held a mortgage on the plaintiff's farm and tools, came to live with the family, alienated the wife's affections, eloped with her, and foreclosed the mortgage on the husband's property.

And in *Briles v. Briles* (1916) 66 Ind. App. 444, 112 N. E. 449, the damages in an action for alienation of the husband's affections were held not excessive where the jury returned a verdict of \$4,500 and a remittitur of \$600 was ordered by the trial court.

And in *Noxon v. Remington* (1905) 78 Conn. 296, 61 Atl. 963, where the jury in an action for alienation of a husband's affections

returned a verdict for \$3,750, and the trial judge ordered plaintiff to remit \$2,050, the balance, \$1,700, was held not excessive.

In *Love v. Love* (1903) 98 Mo. App. 562, 73 S. W. 255, the damages, the amount of which does not appear, were held not excessive in an action for alienation of a husband's affections.

In the following cases, however, the verdicts were held to show passion and prejudice, and to be excessive:

—\$2,000 in an action for plaintiff's husband, where he did not provide for his family, and the plaintiff stated that she would as soon he would be away as at home, *Van Olinda v. Hall* (1895) 88 Hun, 452, 34 N. Y. Supp. 777;

—\$4,875, in an action for alienation of a husband's affections, reduced to \$2,000, where he gave the wife a house, which was the only accumulation of the parties, and it appeared that he drank and that he readily succumbed to defendant's wiles, *Warren v. Graham* (1916) 174 Iowa, 162, 156 N. W. 323;

—\$5,000 in an action against the wife's brother for alienation of affections, there being no evidence that the brother ever advised his sister to leave plaintiff, and it appearing that the wife was apparently dissatisfied with plaintiff's financial circumstances, *Bathke v. Krassin* (1899) 78 Minn. 272, 80 N. W. 950;

—\$10,000 in an action for alienation of the husband's affection, where the wife had largely lost her husband's affections before the defendant came into their lives, and the wife lost nothing financially, except the support of her husband, as he had no means except what he earned from day to day, *Porter v. Heishman* (1915) 175 Iowa, 335, 154 N. W. 503;

—\$16,666.67 in an action for alienation of a wife's affections, *Phelps v. Bergers* (1913) 92 Neb. 851, 139 N. W. 632;

—\$30,000 against the mother of plaintiff's husband for alienating his affections, where the testimony showed that her whole property was worth only about \$28,000, *Sivley v. Sivley* (1909) 96 Miss. 137, 51 So. 457;

—\$2,500 in an action for crim. con., where it appeared that the plaintiff had voluntarily abandoned his wife a long time before defendant's act, and had never contributed to her support, or sought a reconciliation with her, *Berney v. Adriance* (1913) 157 App. Div. 628, 142 N. Y. Supp. 748;

—\$5,000 in an action for alienation of the wife's affections, where there was evidence that the plaintiff had connived at the acts of sexual intercourse between his wife and defendant, and that her love for plaintiff had been eradicated by reason of his having set her on a hot stove, *Peek v. Traylor* (1896) 17 Ky. L. Rep. 1312, 34 S. W. 705;

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—\$25,000 in an action for crim. con., *McKim v. Beiseker* (1919) 56 Mont. 330, 185 Pac. 330.

And a verdict for \$75,000, which was reduced to \$50,000, was held excessive in *Hendrick v. Biggar* (1912) 151 App. Div. 522, 136 N. Y. Supp. 306, an action for alienation of a husband's affections by an actress, and a ground for a reversal, unless the plaintiff consented to reduce the damages to \$30,000. This case was reversed on other grounds in (1913) 209 N. Y. 440, 103 N. E. 763.

And a verdict for \$6,000 was held excessive in *Allen v. Forsythe* (1912) 160 Mo. App. 262, 142 S. W. 820, in an action for alienation of a wife's affection, but it was held that the verdict might stand if a remittitur of \$2,000 was filed.

And a verdict of \$7,000 in an action against plaintiff's mother-in-law for alienating her husband's affections was held excessive, and reduced to \$2,000, where it appeared that the plaintiff's health had not been permanently impaired, and that her husband, instead of representing unfounded insinuations against his wife by his mother, merely went and cried, and then abused his wife. *Heisler v. Heisler* (1910) — Iowa, —, 127 N. W. 823.

And a verdict for \$35,000, which was reduced by the court to \$25,000, for alienation of the affections of a man fifty years old, who had been living separate from his wife, and paying such attention to other women as to indicate little affection for her, was held grossly excessive. *Phillips v. Thomas* (1912) 70 Wash. 533, 42 L.R.A. (N.S.) 582, 127 Pac. 97, Ann. Cas. 1914B, 800.

And in *Smith v. Smith* (1916) 192 Mich. 566, 159 N. W. 349, a verdict of \$12,000 in an action for alienation of a husband's affections by the mother was held excessive, and a remittitur of \$6,000 made, it being apparent that the jury were influenced by indignities which occurred before the alienation.

And a verdict for \$3,000 in an action for alienation of a husband's affections by his father was held so large, in *Rice v. Rice* (1895) 104 Mich. 371, 62 N. W. 833, that it could not be said that the jury did not allow for loss of support, as to which there was no evidence.

In *Lupton v. Underwood* (1912) 3 Boyce (Del.) 519, 85 Atl. 965, a verdict of \$4,000 in an action for alienation of a husband's affections was alleged to be excessive, and the plaintiff consented to a reduction of the verdict to \$12,500.

In *Bannister v. Thompson* (1914) 32 Ont. L. Rep. 34, where recovery was sought on two counts, first, for enticing away plaintiff's wife, and, secondly, for alienating her affections, and the jury failed to find adultery, it was held that the verdict of \$1,000 for loss of love, services, and society covered all the damages recoverable, and set aside an additional finding for \$500.

In *Sheffield v. Beckwith* (1916) 90 Conn. 93, 96 Atl. 316, a ver-
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dict of \$100 in an action for alienation of affections, in which it appears that the husband was totally deprived of his wife's society to the date of trial, was held inadequate, and a reassessment of \$1,750, made by the jury after they reconsidered their verdict, was allowed to stand.

A verdict for \$400 in an action for crim. con. and alienation of a wife's affection cannot be set aside as inadequate, where it appears that when the plaintiff first noticed that his wife was depressed he stood aloof, and himself created the opportunity for her fall by leaving her alone. *Inderlied v. Bullen* (1910) 80 N. J. L. 7, 77 Atl. 469. J. T. W.

[HIGH COURT OF AUSTRALIA.]

SIBLEY and Another (*Plaintiffs*), *Appellants*,
and
GROSVENOR and Another (*Defendants*), *Respondents*.

21 C. L. R. (Austr.) 469.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Sale — Misrepresentation — Rescission.

An untrue statement made by the agent of a lessor of land that he is selling the land on behalf of mortgagees, and for that reason the price asked is lower than it would otherwise be, is such a material misrepresentation as to entitle one who has purchased the land in reliance thereon to rescission with consequential relief on the basis of restitution *in integrum*.

Sale of land — Rescission — Repayment of consideration — Compensation for improvements.

A purchaser of land who, in consequence of a material misrepresentation, is entitled to rescind the contract, is entitled to repayment, with interest of the purchase money already paid, together with the amount expended in substantial repairs and lasting improvements effected on the land by him while in possession, from which must be deducted the value of the use and occupation until rescission.

Agent — False representations — Personal liability — Damages.

An agent of the vendor of land who, with knowledge of its untruth, has made a material misrepresentation entitling one who has purchased in reliance thereon to rescind upon discovering its falsity, is liable in an action for deceit for any money which the purchaser has paid under the contract of which he is entitled to restitution, and also for any money uselessly expended in reliance upon the agent's representation, in preparing to carry on business on the land purchased.

(March 24, 1916.)

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APPEAL from the Supreme Court of Victoria.

In an action brought in the Supreme Court by John Sibley and Maxmillian Georga Newman against Alfred Ernest Grosvenor and Aubert W. Loughnan, the plaintiffs alleged that on 9th December, 1914, they entered into a contract in writing with the defendant Loughnan, by his agent Grosvenor, whereby the plaintiffs agreed to buy and the defendant Loughnan to sell 482 acres 3 roods and 35 perches of land for the sum of 2,060*l.* 1*s.* 3*d.*; that during the negotiations for the sale the defendant Grosvenor made certain false representations including the following: (a) That he was selling as agent for the mortgagees of the land, and that that was the reason why the price was, as he alleged, so cheap, and (d) that portion of the land had been valued at over 6*l.* per acre for loan purposes; and that, relying upon such representations, the plaintiff entered into the contract and paid a deposit of 350*l.* on account of the purchase money and expended labor and money in improvements on the land. Alternatively, the plaintiffs alleged that the defendant Grosvenor made each of the representations knowing them to be false, and by reason thereof the plaintiffs paid the 350*l.* and expended labor and money in improvements, and lost money upon live stock and plant required for working the land, and incurred expenses consequentially upon the contract. The plaintiffs claimed as against the defendant Loughnan rescission of the contract, with allowance for improvements 110*l.*, repayment of 350*l.*, with interest, and an injunction against negotiating promissory notes given under the contract; and against both defendants damages 700*l.* The action was heard by A'Beckett, J., who gave judgment for the defendant Grosvenor without costs, and for the defendant Loughnan with costs.

From that decision the plaintiffs now appealed to the High Court.

[471] Other material facts are stated in the judgments hereunder.

Hotchin, for the appellants. The representation that the sale was on behalf of mortgagees was a material one. The learned judge found that in substance it was made. The plaintiffs are 10 B. R. C.

entitled to recover from the defendant Loughnan, on the footing of rescission of the contract, the amount of purchase money paid and also moneys expended for repairs and improvements on the land. *Dart's Vendors and Purchasers*, 7th ed. p. 517.

[Rich, J., referred to *Williams on Vendors and Purchasers*, 2d ed. p. 836; *Seton on Decrees*, 5th ed. p. 1927.]

They are also entitled to recover, on the basis of an action for deceit, damages which might reasonably be expected to follow (*Newbigging v. Adam* (1886) 34 Ch. D. 582, at p. 589), including losses on stock purchased under circumstances which were in the contemplation of the parties at the time of the contract (*Godwin v. Francis* (1870) L. R. 5 C. P. 295, 39 L. J. C. P. N. S. 121, 22 L. T. N. S. 338). [He also referred to *Redgrave v. Hurd* (1881) 20 Ch. D. 1, 51 L. J. Ch. N. S. 113, 45 L. T. N. S. 485, 30 Week. Rep. 251.]

[Rich, J., referred to *Whittington v. Seale-Hayne* (1900) 82 L. T. N. S. 49, 16 Times L. R. 181.]

Dixon, for the respondent Grosvenor. On the authority of *Craine v. Australian Deposit and Mortgage Bank* (1912) 15 C. L. R. (Austr.) 389, and *Dearman v. Dearman*, 7 C. L. R. (Austr.) 549, the decision should not be interfered with, for the materiality of the representations and the question what were the exact representations made are questions of fact depending on the credibility of witnesses. In the case of a contract induced by misrepresentation the remedies by rescission and by damages for deceit are alternative, and not cumulative. *Halsbury's Laws of England*, vol. XX., p. 720. The plaintiffs are at most only entitled to recover against Grosvenor in the event of their not being fully compensated by Loughnan. Grosvenor was therefore improperly joined as a party. [He also referred to *Ship v. Crosskill* (1870) L. R. 10 Eq. 73, 39 L. J. Ch. N. S. 550, 22 L. T. N. S. 365, 18 Week. Rep. 618; *Burstall v. Beyfus* (1884) 26 Ch. D. 35, 53 L. J. Ch. N. S. 565, 50 L. T. N. S. 542, 32 Week. Rep. 418; *Spencer Bower on Actionable Misrepresentation*, pp. 160, 378.]

[472] **Brennan**, for the respondent Loughnan. This court will not, under the circumstances, interfere with the finding of fact by the primary judge that the representation did not induce the contract.

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Hotchin, in reply referred to *Heatley v. Newton* (1881) 19 Ch. D. 326, 51 L. J. Ch. N. S. 225, 45 L. T. N. S. 455, 30 Week. Rep. 72; *Henderson v. Lacon* (1868) L. R. 5 Eq. 249, 18 L. T. N. S. 527, 16 Week. Rep. 328.

Cur. adv. vult.

Griffith, Ch. J., read the following judgment: This was an action by a purchaser for the rescission of a contract for the sale of land on the ground of misrepresentation. A claim for damages for deceit was added against the agent by whom the contract was negotiated. The contract was made in December, 1914. The defendant Loughnan was the vendor; the defendant Grosvenor was the agent who made the representations complained of, and who is alleged to have known of their falsity. Fraud was not alleged against Loughnan personally. The land was country land situated about 80 miles from Melbourne, and comprising two blocks, one of about 273 acres and the other of about 209 acres. The agreed price was 2,060*l.*, being at the rate of 6*l.* per acre for the larger block and 2*l.* per acre for the smaller.

The misrepresentations now relied on are two: (1) That Grosvenor was selling as agent for mortgagees of the land, which was the reason for asking so low a price, and that they were unwilling to take less than the price named; (2) that the 273 acres had been valued at over 6*l.* per acre for loan purposes. Both representations, if made, were false within the knowledge of Grosvenor, who made them. With respect to the larger block, Loughnan, the vendor, had in November, 1914, taken an assignment of a contract made in July, 1914, by which mortgagees had sold the land for 900*l.* to his assignors. The price to be paid by him to his assignors was at the rate of 3*l.* 15*s.* per acre—about 1,025*l.* The smaller block had been purchased by Loughnan in November, 1914, at the price of 25*s.* per acre,—about 261*l.*

A'Beckett, J., who tried the cause without a jury, said that he [473] believed that Grosvenor substantially made the representation that he was selling the land on behalf of mortgagees and that that was the reason why the price asked, *viz.*, 2,061*l.*,
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was so low, but he did not think that such a representation was material.

With great respect, I am unable to agree with him. The plaintiffs were inexperienced young men who desired to enter on the business of farming. I think that the representation would naturally operate on the minds of such intending purchasers in considering the price they would pay for the land. It cannot be doubted that if they had known the real truth as to the mortgagees' sales, they might have refrained from the purchase on the terms asked. It is true that the vendor was not bound to disclose to the purchasers what he had paid for the land, but, his agent having volunteered information which was material and false, he must take the consequences.

With regard to the other alleged misrepresentation a curious story is told. The plaintiffs say that in the course of the negotiations a typewritten document, which may be described as a handbill, containing particulars of the block of 273 acres, was given to them by Grosvenor. This document, they say, stated that the price asked was 6*l.* an acre, and that the property had been "valued at over 6*l.* per acre for loan purposes." When the contract was concluded they returned this document to Grosvenor, but in the following April they asked him to return it to them, and Grosvenor told his clerk, one Taylor, to do so. Taylor says that he could not find the original document, and compiled, partly from memory and partly from the original instructions from which the handbill had been prepared, what he believed to be substantially a copy of it, which was given by Grosvenor's direction to the plaintiffs. This document contained the statements that the price asked was 6*l.* an acre and that the property had been valued for loan purposes at 6*l.* per acre, as stated by the plaintiffs. Strictly speaking, the document operates only as an admission by Grosvenor that the original document contained that statement. Taylor now says that this is a mistake, and that the original had 5*l.*, and not 6*l.* No explanation was offered as to how he came to make the mistake, and [474] the learned judge did not take any note of his evidence. The improbability of a vendor who asks 6*l.* an acre for land volunteering the information that it had been valued for loan

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purposes at 5*l*. was insisted on by the plaintiffs, A' Beckett, J., believed that the plaintiffs were honest and truthful witnesses, but thought it possible that their recollection of the contents of the original had been colored by what they saw in the supposed copy, and, with much hesitation, declined to refuse to accept Taylor's statement, which was corroborated by Grosvenor.

I am not sure that under the circumstances this court is bound to accept the finding of the learned judge, but it is not necessary to deal with the point, as the first representation is sufficient to dispose of the case.

The result is that the plaintiffs have established against Loughman a case entitling them to rescission of the contract with consequential relief, and as against Grosvenor a case of deceit entitling them to damages. As the statement of claim does not allege a case of deceit against Loughnan, although it claims damages apparently on that basis, it is not necessary to consider the question (which I think is not free from difficulty) whether Loughnan is liable in damages for Grosvenor's deceit.

Some confusion seems to have arisen in argument from not distinguishing between the case of a purchaser who elects to disaffirm a contract for the sale of property which he has been induced to enter into by fraud and the case of a purchaser who elects to affirm it. If he affirms the contract he acquires the property and must allow for all the advantages which he derives from the acquisition. The measure of damages is his loss on the whole transaction. If, on the other hand, he elects to disaffirm the contract, he acquires nothing, and is entitled to be put in the same position as if he had not made it. In many cases this result can be obtained by repayment of the purchase money, if paid, and return of the property. It may or not be necessary to institute legal proceedings. If instituted, they would, under the old system, have been instituted at law or in equity according as the relief claimed was repayment of money or specific relief. But, if rescission of the contract will not completely indemnify the purchaser, he is entitled [475] to bring an action of deceit against any person who has knowingly made the false representation on which he acted. This remedy is entirely independent of and additional

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to the right to rescind. It may be against the vendor himself if he is responsible for the representation, or against the agent if he knew of the falsity, or against both. In such an action the plaintiff may recover any loss which is the direct and natural consequence of his acting on the faith of the defendant's representation (*Mullett v. Mason* (1866) L. R. 1 C. P. 559, 1 Harr. & R. 779, 35 L. J. C. P. N. S. 299, 12 Jur. N. S. 547, 14 L. T. N. S. 558, 14 Week. Rep. 898).

These are entirely distinct causes of suit. The first would, under the old system, have been cognizable only by a court of equity, the second by a court of common law in an action for deceit. But under the new system they may be joined in a single action.

Order XVI. r. 4, of the Victorian Supreme Court rules, corresponding to order XVI. r. 4, of the English rules and order II., r. 4, of the rules of this court, provides that—"all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities, without any amendment."

The judgment to be given in such a case against each defendant is of course such judgment as is appropriate as against him, irrespective of the judgment given against any other defendant.

Interesting instances of the application of this rule are to be found in *Frankenburg v. Great Horseless Carriage Co.* [1900] 1 Q. B. 504, 61 L. T. N. S. 147, 81 L. T. N. S. 684, 7 Manson, 347, and *Compania Sansinena de Carnes Congeladas v. Houlder Bros.* [1910] 2 K. B. 354, 79 L. J. K. B. N. S. 1094, 103 L. T. N. S. 333.

In this case the plaintiffs are entitled as against Loughnan to restitution *in integrum*, which includes rescission of the contract and repayment with interest of the purchase money already paid, together with the amount expended in substantial repairs and lasting improvements effected on the land by them while in possession, from which must be deducted the value of their use and occupation until rescission, with set-off. An account must be taken if asked for.

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As against Grosvenor the plaintiffs are entitled to recover by way of damages for the false representation any moneys which they [476] uselessly expended on the faith of its truth. These include the same sums as those payable by Loughman, and any further expenditure which was properly made by the plaintiff in preparation for performance of the contract and was wasted.

As to the first there is no reason to doubt that the plaintiffs will obtain complete restitution from Loughnan, and it is not necessary to consider the form in which relief in respect of that branch of the case should be awarded as against Grosvenor. As regards the other damages, they are not recoverable in an action for rescission, but are recoverable in an action of deceit (*Whittington v. Seale-Hayne* (1900) 82 L. T. N. S. 49, 16 Times L. R. 181).

In my opinion there is evidence of such damage, but the amount has not been ascertained, and there must be an inquiry if insisted on by either party.

I think that the formal order of the court should be as follows:

1. Agreement dated 14th December, 1914, to be rescinded and delivered up to be canceled.

2. Defendant Loughnan to be restrained from negotiating or suing upon the promissory notes given by the plaintiffs under the contract, and ordered to deliver them or procure them to be delivered up to the plaintiffs.

3. Account of purchase money and interest thereon at 5 per cent per annum from times of payment.

4. Account of all sums expended by plaintiffs in substantial repairs and lasting improvements on the land, together with interest thereon at 5 per cent from the time of disbursement.

5. Inquiry as to the proper rent to be paid by the plaintiffs during the period of their occupation of the land.

The amount so found for occupation rent to be set off against the amounts found in taking the accounts Nos. 3 and 4.

6. Balance to be paid by defendant Loughnan to plaintiffs.

7. Reserve further consideration as to defendant Grosvenor's

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liability in respect of such balance in event of nonrecovery from defendant Loughnan.

8. Inquiry against defendant Grosvenor as to the loss, if any, [477] sustained by plaintiffs in preparing to perform the contract, and not included in the items of accounts already directed, and order for payment of the amount so found by defendant Grosvenor to plaintiffs.

9. Costs of action up to and including trial to be paid by defendants to plaintiffs.

10. Reserve further consideration.

11. Liberty to apply.

12. Respondents to pay costs of appeal.

Barton, J., read the following judgment: In this action the defendants are Alfred Ernest Grosvenor and Aubert W. Loughnan, of whom the first mentioned carried out the impeached transaction for the sale of land on behalf of the last mentioned, who, although the principal, appears to have taken no part in the negotiation which resulted in the sale. The action is brought against both by reason of misrepresentations alleged to have been made by Grosvenor while treating with the plaintiffs. In respect of these the plaintiffs seek (1) a rescission of the contract with Loughnan, with consequential relief and (2) damages against both defendants for deceit. As the appeal was conducted before us, I did not gather that damages for deceit were still pressed for against the principal. The first of these claims can be sustained by mere proof of the misrepresentations, if they or any of them were material inducements to the contract. The second claim requires for its maintenance proof of actual fraud. I am of opinion that the two causes are rightly joined in one action with appropriate distinctions as to the relief for each cause. See order II. r. 4, of the rules of the High Court.

The claim in the writ embraced seven representations, of which six, distinguished in the writ as (a), (b), (c), (c), (f), and (g), were verbal and the seventh, designated (d), was in writing.

At the trial it became evident that (a) and (d) formed the
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substance of the plaintiffs' case, and A'Beckett, J., confined his judgment to the consideration of those two representations.

The verbal representation (a) was "that Grosvenor was selling as agent of the mortgagees of the land in question, and that that [478] was the reason, as he alleged, that the price was so cheap." The written representation (d) was that "portion of the land had been valued at over 6*l.* per acre for loan purposes."

In his judgment A'Beckett, J., found as to (a) that Grosvenor did lead the plaintiffs "to suppose, not perhaps in those precise words, but did give them to believe or lead them to suppose, that he was selling as agent for the mortgagees, and that was why they could get it cheap." His Honor did not think it important "to come to a definite conclusion of the exact representation on that subject," because he thought "a statement of that sort would not be ground for setting aside the contract." His Honor pointed out that Grosvenor was in fact selling as agent, not for the mortgagees, but for a person who had acquired title from the mortgagees. This fact, which established the falsity of the representation, did not of course render it any the less material. That the sale was for the mortgagees would lead to a strong inference that the main object of it was to obtain repayment of the debt, and it is common knowledge that mortgagees' sales do often lead to cheap bargains. On the other hand, while a person may acquire land from the mortgagees cheaply, that affords no inference that his resale will also be cheap.

Loughnan had bought 273 acres, the more valuable part of the 482 acres in question, from Crowe and others, who had bought from the mortgagees. It was only in respect of the remaining and less valuable 209 acres that there had been a mortgagees' sale, Loughnan having purchased that portion through Grosvenor from C. G. Shaw, who held a mortgage over it. Now, while his Honor does not go further than to express the belief that some such representation as (a) was made, he does go that far. Therefore in finding, as I do, that the representation was made in so many words by Grosvenor to both the plaintiffs, I come to a conclusion more definite than the
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finding of his Honor. But his belief as expressed is to the same effect, though it extends only to the substance, not to the precise words, of the representation. Believing that the false representation was material and that it must have been a strong inducement to the purchase, I find in it a sufficient ground for the rescission of the contract as against the principal, who, though not [479] himself to blame, cannot be allowed to profit by his agent's conduct.

But the representation was not only false; it was false to the knowledge of the defendant Grosvenor. He was a party interested, because the larger the price obtained, the larger his commission, and I find nothing in the authorities which should save a fraudulent agent, under such circumstances as exist here, from the proper consequence of his fraud, which is, that he should make good to the plaintiffs the losses immediately and directly caused by the fraud.

With regard to the representation in writing, namely (d), it is not denied that if made it was most material. Nor is it denied that if made it was untrue. The contest as to its truth rests largely on the evidence of one Taylor, Grosvenor's clerk, who was examined and recalled.

His Honor has made no note of Taylor's evidence, and I hesitate to express an opinion on this part of the case in view of that fact that the claim for rescission of the contract and damages against the agent is established on grounds already stated.

I agree that the appeal must be allowed and the proposed order made.

Isaacs, J., read the following judgment: The action is primarily for rescission of an executory contract to sell agricultural land, the appellants being purchasers, the defendant Loughnan the vendor, and Grosvenor, the vendor's agent, effecting the sale.

The ground upon which rescission is claimed is fraudulent misrepresentation by Grosvenor, and there emerge only two of the alleged misrepresentations which it is necessary to consider. They are: (1) That Grosvenor said he was selling as agent
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for the mortgagees of the land, and that that was the reason why the price was so cheap; and (2) that he said that portion of the land had been valued at over 6*l.* per acre for loan purposes.

There is also what is pleaded as an alternative claim for damages as against both defendants for Grosvenor's representations, the loss sustained being stated to be for 350*l.* deposit, for the purchase of seed, for wages, for railway freight on furniture and utensils, and for actual loss on cattle, horses, cart, harness, and plow, and also a sum for the plaintiff's own labor, etc.

[480] The first representation A'Beckett, J., found was substantially made. That appears to me to be a correct finding. But the learned primary judge thought the statement immaterial because it merely indicated the motive impelling Grosvenor to say the land was cheap. Learned counsel for the respondent Grosvenor properly conceded that to state to a proposed purchaser, who was urged to buy, that the vendor was the mortgagee of the land, could not be universally said to be immaterial, and, although untrue to the personal knowledge of the person making the statement, not to affect the contract. He contended that it might or might not be a material inducement in a given case according to the circumstances, and that as the primary judge had come to the conclusion of fact that, in the circumstances of this case, the representation did not materially induce the appellants to purchase, the appellate court ought not to disturb that finding.

A similar contention arose in respect of the second representation, but in a different way. The latter representation was admittedly material in every way, but was denied, and the learned judge relying largely on the evidence of Taylor, who typed exhibit A (the typewritten document already referred to), declined on the whole to find in the appellant's favor.

So that we are asked to reverse two findings of fact by the primary court,—(1) that the first representation though made was not a material inducement, *dans locum contractui*, but only *incidens contractui*; and (2) that the other representation complained of was not made.

These two findings admirably illustrate the true position of an
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appellate court in relation to a court of first instance. In *Dearman v. Dearman*, 7 C. L. R. (Austr.) 549, I stated my view of that position, and have in later cases repeated it, and acted on it, sometimes to maintain, and in other instances to overrule, the conclusion of the primary tribunal. There is only one point I wish to emphasize here, and that is what is there said (7 C. L. R., at p. 561), that where the final result depends upon any inference based on common knowledge or on ascertained facts, and not upon circumstances appearing only in the primary court, or as I there called it "unrecorded material," the appellate court is bound [481] to bring to the decision its own opinion. This principle was acted on in *Owners of S. S. Draupner v. Owners of Cargo of S. S. Draupner* [1910] A. C. 450, 79 L. J. Prob. N. S. 88; 103 L. T. N. S. 87, 26 Times L. R. 571, and has still more recently been again made the subject of judicial observation. In 1914 the House of Lords had to reconsider the principle, or rather its application, in *Watson, Laidlaw & Co. v. Pott, Cassels, and Williamson* [1914] S. C. 18, 31 R. P. C. 104, 51 Scot. L. R. 238. Lord Kinnear, after putting aside credibility, says, 31 R. P. C., at p. 110: "The learned judges of the Inner House had thus no alternative but to consider the evidence for themselves, and give their own judgment on the facts as if they were judging in the first instance." Lord Atkinson also deals with the subject very fully, and this passage occurs in his Lordship's judgment, 31 R. P. C. at p. 113: "Of course, the judge who has had the great advantage of seeing and hearing the witnesses, who are examined before him, is in a far better position to judge of their credibility than anyone can be who has not had that advantage, and that consideration should never be lost sight of on appeal from the decision of a judge so placed; but, credibility apart, it by no means follows that he is in a better position to draw the correct inference from the evidence given, than are the judges of the court which has only the notes of that evidence before it."

I apply those considerations to the two questions of fact mentioned.

As to the first, it is quite uncomplicated. When property is sold by mortgagee, it is well known that he is selling primarily
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to get paid his debt, which, according to human instinct and common practice, is probably more than covered by the property mortgaged. He is, of course, not to be understood as sacrificing the property, or selling merely so as to get back his own; he owes some duty to the mortgagor, but yet his desire and his right to get paid, by means of a forced sale, undoubtedly constitute a factor which affects the mind of a proposed purchaser as to whether he is getting an advantageous bargain or not, and, at least, whether he is paying more than the fair value. Ordinarily, and in the absence of contrary circumstances, it would be likely to materially assist in inducing the purchaser to accede to the price asked.

[482] The court has for this question all the materials before it which the learned judge of first instance had, and, in my opinion, the appellants' case was proved as to this.

That would be sufficient to sustain the appeal, but the other point has been fully argued, and affects more than one question of law and practice, and so I express my views upon it.

The second representation is said to have been contained in a document now lost. The onus of proving the issue rested, undoubtedly, on the appellants. But when they produced exhibit A, and proved, as is acknowledged, that that document was handed to them by Taylor upon Grosvenor's direction, it was an admission by Grosvenor that exhibit A reproduced the original document, and that, consequently, the representation was made. The admission was not an estoppel, but the onus lay on Grosvenor of satisfactorily explaining it and proving its incorrectness. I take it to be a clear rule of law that, although the burden of establishing a given fact rests initially on one party, yet once he shows an admission of that fact by the opposite party, then if there is no estoppel the latter has both the right and the burden of satisfying the tribunal that the admission was an error; otherwise the fact should be taken as established.

Whether that burden of explanation was properly discharged or not depends entirely on what Taylor said: Unfortunately, though the learned primary judge manifestly listened to Taylor most attentively and weighed his testimony carefully, his at-

tention was apparently so riveted on the witness that he did not trouble to write down what the witness said. One result is that Taylor's evidence—the crucial evidence—is part of the “unrecorded material” upon which the decision went. That may or may not be the appellants' misfortune, but leaves us, as I conceive, unable to say the finding appealed from was wrong.

The appellants being entitled to succeed, however, on the first representation, the question is, What is the proper order to make?

One observation I make at once as it settles one point effectually. Loughnan is not alleged or proved to have been personally fraudulent, and so, whatever his imputed liability might have been in the absence of rescission, he cannot, rescission being granted, [483] be held further responsible for the fraud of Grosvenor, the scope of whose authority was limited to contracting to sell the land, and whose representation only affected its intrinsic value. No doubt Grosvenor's misrepresentation in Loughnan's business is, in the first instance, imputable to Loughnan; but the point is, that its fraudulent nature only gives the plaintiffs a choice either of holding to the contract—and with that Loughnan's imputed responsibility for Grosvenor's fraud—or of disaffirming the contract entirely on the ground of material misrepresentation (whether fraudulent or innocent is in this case immaterial), and thereby ending Loughnan's connection with it. In other words, rescission implies complete restitution, which connotes the same result be the misrepresentation innocent or not. No further damages can then be given against Loughnan for a fraud which he did not commit, did not authorize, and which, as the only ground of imputation has been destroyed, cannot henceforth be imputed to him.

It remains to be seen how far Grosvenor himself is answerable for that in the circumstances.

Rescission is claimed as the primary relief, Loughnan being a party; and there is no reason for refusing it, since upon the facts substantial restitution is impossible, on the one side, by means of handing back the property sold, the plaintiffs accounting for rents and profits and for deterioration and being

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allowed for improvements, and, on the other side, by accounting for the deposit paid, with interest, returning the promissory notes given for the balance, or indemnifying the plaintiff in respect of them if already negotiated, and recouping all necessary expenses so far incurred in connection with carrying the contract on to completion,—the just balance being paid to the person entitled.

But restitution being made, the *status quo ante* is taken to be restored so far as the contract itself is concerned, and, where anything further is claimed, it is necessary, I apprehend, to bear in mind the essential distinction of such a position from that existing when apart from merely undoing the contract an additional remedy for the collateral fraud is sought either at common law, by way of damages in an action for deceit, or in equity, by way of compensation founded upon the same principles as at law.

[484] Rescission assumes the whole bargain undone, and as regards Loughnan there is no difficulty. But as regards Grosvenor two questions arise, both of which are contested. First, Can an order be made against him as to rescission? and, secondly, Can he be made liable under the alternative paragraph for the damages claimed *ultra*?

As to rescission, the first objection made is that it is not claimed as against him. But that is met by the rules of the Supreme Court 1906 (order XX., r. 6), and there is nothing claimed inconsistent with that remedy,—even if inconsistency not amounting to election would be an answer.

Then the solid question remains whether equity recognizes a right in the appellants to require Grosvenor to see that the terms of undoing the contract are carried out by Loughnan. In my opinion it does. It is not a mere question of making a person a party, because he is an agent or an arbitrator or a solicitor, for the purpose of discovery or costs. So far as that is concerned the case of *Burstall v. Beyfus* (1884) 26 Ch. D. 35, 53 L. J. Ch. N. S. 565, 50 L. T. N. S. 542, 32 Week. Rep. 418, settles the matter, at all events wherever the Judicature Act applies. I should personally be prepared to apply the rule stated and acted on there by the Court of Appeal. It does not
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differ materially from the reasoning of Wigram, V.C., in *Marshall v. Sladden* (1849) 7 Hare, 428, at pp. 441, 443, 68 Eng. Reprint, 177, 19 L. J. Ch. N. S. 57, 14 Jur. 106, and see Story on Equity Pleadings, p. 228. But I found my opinion on the fact that Grosevenor led the appellants into the bargain, with its proximate consequences, and it is his misrepresentation which is the ground of escape from the bargain and those consequences, and that he was fraudulent in making that representation.

The jurisdiction of equity, as always exercised with respect to fraud, regards all persons directly concerned in the commission of a fraud as principals, no person being permitted to excuse himself on the ground that he was the agent of another. That is the first great principle laid down by Westbury, L. C., in *Cullen v. Thomson's Trustees* (1862) 4 Macq. H. L. Cas. 424. Another great principle the Lord Chancellor laid down was this: "In cases of fraud the remedy should be coextensive with the injury." The jurisdiction therefore extends [485] in the first place to compelling Grosvenor to see that the appellants get rid of the contract and its attendant consequences, not by way of damages or compensation, but on terms of mutual restitution. That implies that Loughnan is a party, and that his rights are provided for; which is the case. A separate action against Grosvenor for rescission, or for relief founded on a right of rescission which had never been lawfully exercised at law by the party, or on a rescission which had been decreed against Loughnan, would necessarily fail. That Grosvenor's responsibility in this respect might be enforced by declaring him liable to indemnify the appellants on the basis that Loughnan is bound by an order for rescission and restitution is established by what James, L.J., says in *Clark v. Girdwood* (1877) 7 Ch. D. 9, at p. 23. The passage is as follows: "The court has jurisdiction in cases of fraud, and where a person against whom no relief could otherwise be asked is made a party to a suit on the ground of fraud, it is because the court has jurisdiction to indemnify the person injured at the expense of all persons, whether solicitors or not, who have been acting participators in the fraud, and it can, therefore, make any party to the fraud

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pay the costs of the proceedings which have been rendered necessary by the fraud in which he has taken part." This statement is broad and general, and there is no case which says that a fraudulent agent is not bound to make that full indemnity, and *Ship v. Crosskill* (1870) L. R. 10 Eq. 73, 39 L. J. Ch. N. S. 550, 22 L. T. N. S. 365, 18 Week. Rep. 618, is to the contrary.

But I do not think any of the damages claimed *ultra* should be awarded under the head of rescission.

Where there is rescission the assumption is that the contract is set aside, and, by means of the mutual allowance already mentioned, full restitution is made so far as relates to the making of the contract and its incidental expenses. There the matter stops. (See Halsbury's Laws of England, tit. "Misrepresentation," vol. xx. p. 744, note (1).)

Losses in working the property on the basis of its being the property of the appellants cannot, as I conceive, come under the head of restitution upon rescission of contract which does not inquire whether the property was more or less valuable than the [486] price given for it; and as the contract is here rescinded those damages are not recoverable under that head.

Nor do I think the damages *ultra* are recoverable for the particular fraud proved. First, it must be remembered that at common law where the property is retained by the purchaser and he brings an action of deceit whereby he was induced to enter into the contract, such items as are now in question could not be taken by themselves, since on the whole the purchaser might have made a very profitable bargain. There is no evidence that he did not. Damages, no less than compensation, restitution, or rescission, are in theory restoration.

Equitable compensation where there is no rescission proceeds on the same basis as damages at law.

I do not say such damages as those claimed could not, in a proper case, be recovered notwithstanding rescission, and either by a common-law action for deceit or an equity suit for compensation. Damages recoverable for fraud are those sustained by acting on the fraudulent representation (*Smith v. Chadwick* (1884) 9 App. Cas. 187, 50 L. T. N. S. 697, 32 Week. Rep. 10 B. R. C.

687, 48 J. P. 644). The only misrepresentation proved, however, is that the vendors were the mortgagees. This goes no further than inducing the purchase. It is not like the purchase of shares which involves the purchase of an existing obligation to pay calls. Nor is it like a representation which induces independently some other action. Whatever was here done afterwards was done for motives and reasons independent of the misrepresentation found, and in doing what they did the plaintiffs were *not acting on that representation*, and the moneys claimed *ultra* are not recoverable either as damages or compensation. A fraudulent representation in other terms, and extending to matters subsequent to the purchase, and inducing action on those matters, might have had other results.

In my opinion the appeal should be allowed as against both respondents on the basis of rescission, with appropriate declarations and orders as against both defendants on that basis, and not further.

Gavan Duffy, J.: I assent to the order proposed by the Chief Justice.

[487] Rich, J.: I also assent to it.

Appeal allowed. Order appealed from discharged. Order as stated in judgment of Griffith, Ch. J.

Solicitor for the appellants, *J. Birtwistle*.

Solicitors for the respondents: *Blake & Riggall, F. J. Hamilton Rowan*.

Note.—False statement as to why price was low as ground for rescission of sale.

It will be observed that in the reported case (*SIBLEY V. GROSVENOR*, *ante*, 404) statements made by an agent of the owner of farming land that he was selling on behalf of mortgagees and that for that reason the price was lower than it otherwise would be, which were false to the agent's knowledge, were held material misrepresentations and ground for rescinding the contract, although they were made without the owner's knowledge or authority.

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The question here considered is rather a novel one. Most of the false statements relied upon for rescission are statements made in order to justify the asking of a high price, and there is little authority bearing on the question whether false statements as to why the price asked was so low constitute a ground for rescission.

In *Overhulser v. Peacock* (1910) 148 Mo. App. 504, 128 S. W. 526, there was held no ground for rescission for fraud where the plaintiff, when asked by the defendant, a horse trader, to sell a horse, told him that the horse was not fit to sell; that if he was all right the price would be \$200, but that the defendant could not buy him, that he had had the distemper; which had left his wind a little heavy; and it appeared that the defendant nevertheless insisted on seeing the horse, and, when he was brought out, ran him about the lot, and after examination by the defendant and another horseman who was with him, the defendant bought him for \$162.50, and a few days afterwards stopped payment on the check given on the ground that the horse had the heaves, and that this was known to the plaintiff and was not disclosed to the defendant, who did not know it. The court here said: "The main point urged here is that, if plaintiff knew the horse had heaves, he was bound, in every event, to notify defendant of the fact; was *ipso facto* guilty of a fraud if he did not, regardless of whether the disease was detectible by an ordinary inspection, or of the price defendant was to pay. In our opinion this proposition is not the law, and, moreover, is inconsistent with instructions asked by defendant. Defendant insisted on seeing the horse against plaintiff's wish, and bought on his (defendant's) own judgment and that of the expert he had with him, after full inspection, and, according to his own version of what occurred, after statements by plaintiff about the condition of the horse, which, on any view of what was said, should have induced the most cautious examination. Moreover, defendant was told, if the horse was sound, plaintiff's price would be \$200, and a much lower price was paid. For silence in respect of a defect in an article to afford ground for rescission by the buyer, when he buys on his own judgment and no warranty is given, the silence must be attended by circumstances which render it fraud,—there must be some agreement or relationship that makes it the duty of the seller to divulge the defect. . . . At most, the issue of fraudulent concealment by plaintiff was for the jury, as there was ample evidence that no fraud was intended or practised."

In *Grinnell v. Hill* (1905) 1 Cal. App. 492, 82 Pac. 445, which was an action upon a promissory note given to pay for 500 shares of oil stock, it was alleged in defense, and there was ample evidence sustaining the allegations, that the plaintiff represented to the de-

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fendant that he had purchased 5,000 shares at 25 cents a share, which was less than its market value, and that on account of friendly relations existing between them he was willing to sell the defendant half of the stock at the price he had paid for it, that as a matter of fact the plaintiff had purchased the stock at 10 cents a share, and that this was its full market value, that upon the defendant's discovery of the fraud he rescinded the contract and demanded the return of the note. It was held that the allegation and proof of these facts constituted a good defense to the action. J. T. W.

[ONTARIO APPELLATE DIVISION.]

RE LUNNESS.

46 Ont. L. Rep. 320.

Wills — Construction — "Property situated in Province of Ontario" — Inclusion of railway stock certificates kept in Ontario.

The words "property situated in the Province of Ontario" as used in a will relate to real property, and do not include railway stock, although the certificates were kept in Ontario and the testator's domicile was there, it appearing that he died leaving real estate in Ontario and leaving three daughters and a son, and, by the terms of his will after making certain specific bequests, he devised and bequeathed all of his real estate of every kind and all of his personal estate and effects whatsoever not otherwise disposed of by his will to his executors upon trusts set out in six sub-clauses, providing, in substance, first, for the widow's occupancy of the homestead during her life and an annuity; second, after taking care of bequests before set forth, for the sale of all of his "property situated in the Province of Ontario" in the discretion of the trustees within a certain time, the proceeds to be divided equally among his three daughters, and after a specified time to sell and dispose of his property situated in Saskatchewan and Alberta, and divide the proceeds equally among his four children; third, that until the "said partial division" of the estate should take place to pay the balance of the income of the estate, after paying the legacies and making the advances and payments to or for the benefit of his widow, equally among his four children; fourth, for the carrying on of testator's business and the division of the profit therefrom among his "said four children;" fifth, after his widow's death, for the sale of real estate retained for her benefit and also "the balance of my property real and personal," and the division thereof "equally among my said children as herein before set forth;" sixth, that the trustees should have power to sell and convert all of the real and personal estate, to invest and reinvest.

— Meaning of word "situated."

The testator, in employing the word "situated" as above, intended
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to use it in the sense in which it would be understood by an ordinary person, and did not intend to attribute a situs to the railway stock, and such stock was therefore divisible among his four children, and not among his three daughters alone.

Meredith, C.J.C.P., dissenting.

Situs of incorporeal property.

The assumption that incorporeal property can have a situs is fallacious.

(November 28, 1919.)

[321] MOTION by William T. Worthy, surviving executor of the will of James Lunness, deceased, for the advice and direction of the court on the proper construction and interpretation of the will of the deceased, with reference to certain questions set out below.

The will, omitting formal parts, was as follows:—

This is the last will and testament of me, Joseph Lunness, of the city of Toronto, in the county of York, drover, made this fourth day of March in the year of our Lord one thousand nine hundred and fifteen.

1. I revoke all wills or other testamentary dispositions by me at any time heretofore made and declare this only to be and contain my last will and testament.

2. I direct all my just debts, funeral and testamentary expenses, to be paid and satisfied by my executors and trustees hereinafter mentioned as soon as conveniently may be after my decease.

3. I bequeath to my wife Mary Lunness all my furniture books pictures provisions and all my other household effects for her own absolute use.

4. I devise and bequeath to each of my daughters Annie L. Jackson, Beatrice Sophia Webster, and Jessie C. Johnston 250 shares of stock in the Canadian Pacific Railway Company and to my son Joseph Readnan Lunness 50 shares of stock in the Canadian Pacific Railway Company such stock to be transferred to my said children within six months after my decease.

5. I devise and bequeath the sum of \$1,000 to be paid free of legacy duty to each of the six sons of my sister Sophia Worthy;

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should any of my said nephews predecease me the share which would have gone to such deceased nephew shall go and belong to his brothers in equal shares.

6. I devise and bequeath the sum of \$1,000 to be paid free of legacy duty to each of the four children of my nephew the late William J. Lunness; should any of said children predecease me the share which would have gone to such child shall go and belong to the survivors in equal shares.

7. I devise and bequeath all my real estate of every kind and all my personal estate and effects whatsoever not otherwise disposed of by this my will unto my executors and trustees hereinafter named and the survivor of them and his successors their [322] and each of their heirs executors and administrators respectively according to the nature thereof, upon the following trusts:—

(1) To pay the taxes and insurance and keep in a reasonable state of repair for the use of my wife during her natural life my dwelling house in the township of Etobicoke near Long Branch, and the lands appertaining to and now used in connection with same.

And to pay to my said wife free of all legacy duty and income tax if any an annuity of \$1,000 per annum payable quarterly the first payment thereof to be made at the expiration of one month after my death.

The said provisions heretofore made for the benefit of my said wife shall be accepted by her in lieu of all claims which she might have against my estate for dower.

(2) After providing for the bequests hereinbefore set forth in this my will to sell and dispose of any or all of my property situated in the Province of Ontario at any time in their discretion within ten years from the date of my decease and to divide the proceeds thereof equally amongst my three daughters Annie Lunness Jackson, Beatrice Sophia Webster, and Jessie C. Johnston; and after the expiration of five years after my decease to sell and dispose of all my property situated in the Provinces of Saskatchewan and Alberta and to divide the proceeds thereof equally amongst my four children Annie Lunness Jackson,
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Beatrice Sophia Webster, Joseph Readman Lunness, and Jessie C. Johnston.

Provided always that if any child of mine shall die in my lifetime leaving a child or children who shall survive me then in every such case the last-mentioned child or children shall take and if more than one, equally between them, the share which his, her; or their parent would have taken of my said estate if such parent had survived me and if any of my said children shall die without issue then the share or shares which should have gone to such deceased child shall be divided equally amongst my said children share and share alike.

(3) That until the said partial division of my said estate takes place my executors shall after making payment of the legacies hereinbefore provided for and making the advances and payments to or for the benefit of my said wife pay the balance of the income derived from my said estate equally amongst my said four children.

[323] (4) My said executors and trustees shall assume my interest in the firm heretofore carried on by me and my partners under the name and style of "Lunness Rogers and Halligan" and carry on the same as it was carried on in my lifetime and if they deem it advisable in their discretion they may appoint my son to look after the interest of my said estate in the said business paying to him such salary as they may deem reasonable and all share or profit received from the said business shall be divided equally amongst my said four children.

(5) After the death of my said wife the said real estate which was retained for her benefit and the balance of my property real and personal shall be sold and divided equally among my said children as hereinbefore set forth.

(6) I give my executors and trustees full power and authority to sell call in and convert into moneys all my real and personal estate and to execute conveyances thereof and from time to time to change any investments and to reinvest the moneys belonging to my estate in any investments authorized by law for executors to invest money in.

I nominate and appoint my nephew William T. Worthy, of the city of Toronto, salesman, and my son-in-law Sidney C.
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Johnston, of the said city of Toronto, to be the executors and trustees of this my last will and testament.

The motion was heard by Sutherland, J., in the Weekly Court, Toronto.

R. U. McPherson, for the executor.

R. McKay, K.C., for J. R. Lunness, the son of the testator.

T. R. Ferguson, for the daughters of the testator.

Sutherland, J.: The testator, Joseph Lunness, made his will in the Province of Ontario, bearing date the 4th March, 1915, and died on the 3d November following, when temporarily absent therefrom. Letters probate were granted to his nephew, William T. Worthy, and his son-in-law, Sidney C. Johnston, the executors therein named. The latter died on the 23d November, 1918, and the widow of the testator on the 5th May, 1919.

The estate was of about \$300,000 in value, of which, roughly [324] speaking, \$240,000 has been administered, and the accounts in connection therewith were passed on the 23d December, 1918.

It comprised, amongst other things, real estate in Ontario of about \$8,600 in value, being the dwelling house of the testator in his lifetime and the lands appertaining thereto; real estate in Alberta, valued in the inventory filed upon application for probate at \$5,000, and in Saskatchewan at \$40,000. There were also 1,191 shares of Canadian Pacific Railway Company stock, and 7 shares of Minneapolis, St. Paul, & Sault Railroad Company stock. In addition, there were household goods and furniture, farming implements, an interest in the firm of Lunness, Rogers, & Halligan, some horses, cattle, sheep, and swine, and farm produce, and some notes, mortgages, and cash in bank.

In the earlier clauses of the will there is a direction for the payment of debts, funeral and testamentary expenses, a bequest to his wife of the furniture, books, pictures, provisions, and household effects, a bequest to each of his daughters, Annie L. Jackson, Beatrice Sophia Webster, and Jessie C. Johnston, of 250 shares of the Canadian Pacific Railway Company stock, and to his son, Joseph Readman Lunness, of 50 shares thereof, to be

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transferred to them within six months after the testator's decease, and a bequest of the sum of \$1,000 to each of the six sons of his sister, Sophia Worthy, and of \$1,000 to each of the four children of his nephew, William J. Lunness, deceased. Other clauses are as follows:—

[The learned judge then quoted clause 7, with all its sub-clauses, as set out above.]

By agreement of the members of the family interested, all of whom are adults, an arrangement, it is said, was made by which the annuity to the widow was increased and paid to her till the time of her death.

The surviving executor upon this motion desires the advice and direction of the court on the proper construction and interpretation of the will, with reference to certain questions as follows:—

“Q. 1. Is stock of the Canadian Pacific Railway Company property in Ontario or in Saskatchewan or in Alberta, or in any of them, within the meaning of subclause 2 of clause 7 of the will?”

[325] The certificates for the shares of the Canadian Pacific Railway Company stock had been placed by the testator in his lifetime in a box in a safety deposit vault, in the Province of Ontario, and were there at the time of his death.

It is argued on the one hand, on behalf of the three daughters, Annie Lunness Jackson, Beatrice S. Webster, and Jessie C. Johnston, that the word “property” in subclause 2 of clause 7 is wide enough to include and does include the said shares of stock, which are therefore claimed by them. On the other hand, it is argued on behalf of the son, Joseph Readman Lunness, that in the first place the word “property,” particularly when modified or limited by the associated word “situated,” has application only to real estate in Ontario, and in the next place that the shares of the Canadian Pacific Railway Company, whose head office is at the city of Montreal, in the Province of Quebec, cannot be said to be property in any other province in the Dominion of Canada.

In many of the cases dealing with wills, in which the scope of the word “property” was in question, the point often was

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whether it covered real estate at all or was simply a term used with reference to personal estate. The word "property" is one of wide scope.

In *Jarman on Wills*, 6th ed. vol. 1, p. 990, the learned text-writer puts the matter broadly thus:—

"If a testator gives all his 'estate,' or all his 'property,' these words will prima facie carry his real estate, for they are sufficient to include both real and personal estate."

And again, at p. 999:—

"'Property' is a word of almost, if not quite, as strong operation as the word 'estate.'" But a testator may show by the context that he uses the word 'estate' or 'property' in a restricted meaning. Thus if he disposes of his 'personal estate and property,' or 'personal property, estate, and effects,' the word 'personal' will as a general rule override the whole."

In *Halsbury's Laws of England*, vol. 28, ¶ 1332, pp. 711, 712, note (g), it is said:—

"In gifts such as a gift of 'my property' the words prima facie include the testator's real and personal estate and the whole of the testator's interest therein (*Doe d. Wall v. Langlands* (1811) 14 East, 370, 104 Eng. Reprint, 644)."

[326] In the present will there are no words indicating that the word "property" is restricted in any way unless it can be said that the word "situated" has that effect. It is argued that that word is applicable to real estate, and cannot properly be used with reference to personal estate, and that in consequence, when associated in the clause in question with the word "property," it necessarily means "real property."

I cannot think, having regard to the whole will, that the word "situated" after the word "property" really makes any difference in the construction to be given to the word "property," or that it must be confined to real property only.

In *Guthrie v. Walrond* (1883) L. R. 22 Ch. Div. 573, Mr. Justice Fry points out, at p. 576, that personal property can have a locality as well as real property: "Lastly, in the case of *Earl of Tyrone v. Marquis of Waterford* (1860) 1 De G. F. & J. 613, 625, 45 Eng. Reprint, 499, the Court of Appeal had to consider the meaning of the expression 'land and property' of the testator
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in the county of Northumberland, and it was held that debts due to the testator in respect of collieries in the county of Northumberland passed as property in that county. The Lord Chancellor, in delivering judgment in that case, said: "The word "property" used in this will appears to me to have its most extensive signification. Personal property may have a locality, as we well know from the cases in the books respecting *bona notabilia*; and in the late case of *Horsfield v. Ashton* (1856) 2 Jur. N. S. 193, 1 Week. Rep. 259; *Ashton v. Horsfield* (1860) 6 Jur. N. S. 355, 2 L. T. N. S. 1, 8 Week. Rep. 285, the House of Lords gave full effect to the doctrine of the locality of personalty, where the subject of the gift is intelligibly described.' "

I am of opinion, therefore, that the words "property situated" include all the real and personal property which the testator owned in the Province of Ontario after providing for the bequests mentioned.

A number of succession duty cases were cited in support of the contention that the Canadian Pacific Railway Company stock could not be said to be property situated in Ontario. In such cases, however, the decisions turned largely on the special words in the statutes in question, and the judgments were not altogether in accord, because the statutes of the different provinces are not identical. I am inclined to think they have not much application.

[327] The case of *Toronto General Trusts Corporation v. The King* (1919) reported in 35 Times L. R. 450, [1919] A. C. 679, is a late and interesting one. It was there held that "the rule that the locality of a mortgage at the time of the creditor's death is the place where the mortgage is then found has no application where the mortgage has been created or is evidenced by two or more deeds of collateral value, which are found in different jurisdictions. In such cases regard must be had to other circumstances, such as the residence of the mortgagee, the place of payment, and the situation of the mortgaged property."

Reference may be made also to *Blackwood v. The Queen* (1882) 8 App. Cas. 82, at p. 84, 52 L. J. P. C. N. S. 10, 14, 48 L. T. N. S. 441, 31 Week. Rep. 645, as to the legal effect of the maxim *mobilia sequuntur personam*.

I am of the opinion that the Canadian Pacific Railway Com-
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pany stock must be taken to be situated in Ontario and covered by the word "property" in subclause 2.

Perhaps I should say a word about another matter. The question in expounding a will is: "What is the meaning of the words used by the testator therein?" An affidavit of Joseph Lunness was sought to be read on the motion, with a view of showing that the testator ordinarily meant "real estate" when using the word "property." But, if a word in a will is definite, and not susceptible of doubt, as I think in the case of the word "property," evidence is inadmissible to show that it has a different or restricted meaning. *Dawson v. Higgins* [1900] 2 Ch. 756, 69 L. J. Ch. N. S. 789, 48 Week. Rep. 673, 83 L. T. N. S. 209; *Higgins v. Dawson* [1902] A. C. 1, 71 L. J. Ch. N. S. 132, 50 Week. Rep. 337, 85 L. T. N. S. 763; Jarman on Wills, 6th ed. (1910) vol. 1, pp. 485 and 506; Wigram's Extrinsic Evidence in Aid of the Interpretation of Wills, 5th ed. (1914) pp. 11 and 12; Hawkins on Wills, 2d ed. (1912) p. 14. I therefore rule out the evidence offered.

The first question will, therefore, be answered as follows:—

"The stock of the Canadian Pacific Railway Company is property in Ontario."

Question 2 is as follows: "Which of the children of the testator are entitled to the stock of the Canadian Pacific Railway Company belonging to the said estate, which is disposed of by subclause 2 of clause 7 of the will?"

The answer is: The testator's three daughters, Annie Lunness Jackson, Beatrice Sophia Webster, and Jessie C. Johnston.

[328] The third question is: "Does Joseph Readman Lunness take any share or interest, and if so what, under subclause 2 of clause 7 of the said will, in the property of the testator situated within the Province of Ontario?"

It seems to me that, after the partial division of the estate referred to in clause 7, subclauses 2 and 3, of the will, there would be left of the estate in Ontario to be dealt with under clause 7, subclause 5, upon the death of the wife of the testator, the fund which had been set aside to create the annuity in her favor and the homestead property. Apart from the interest which Joseph Readman Lunness had in the balance of the income

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hereinbefore referred to, and that he would take upon the death of his mother, I am of opinion that he takes no other share or interest in the property of the testator situated within the Province of Ontario. All other property in Ontario belongs equally to his three sisters and passes to them under clause 7, subclause 2, of the will. Upon the death of the testator's widow, subclause 5 of clause 7 of the will applies, and the four children of the testator, namely, Annie Lunness Jackson, Beatrice Sophia Webster, Joseph Readman Lunness, and Jessie C. Johnston, share equally in the residue of the real and personal property of the testator, the expressions in that subclause, "divided equally" and "as hereinbefore set forth," having that meaning.

Question 4 is as follows: "Provided that such of the defendants as are entitled to the property mentioned in subclause 2 of clause 7 of the will so agree, (a) may the executors divide such property *in specie* among them, instead of selling it and dividing the proceeds?" All the persons interested being *sui juris*, I am of opinion that this question should be answered in the affirmative.

"(b) When should the division of such property be made?" I am also of opinion that for the same reason it may be made at any time. Besides, as to the property situated in the Province of Ontario, and referred to in the first part of subclause 2 of clause 7, there is a discretion placed in the hands of the executors as to the time.

"Q. 5. May the executor divide the property in the Provinces of Saskatchewan and Alberta, mentioned in subclause 2 of clause 7 of the will, among those of the defendants who are entitled thereto, before the expiration of the period of five years specified [329] in subclause 2?" The parties being *sui juris*, this question may be answered in the affirmative.

While the answers to the questions already given dispose of the substantial matters referred to upon the argument, certain further questions are asked in the notice of motion, as follows:—

"6. Are mortgages of lands within Ontario property of the testator situate in the Province of Ontario within the meaning of subclause 2 of clause 7 of the said will?"

"(a) When such mortgages were held by the testator at the time of his death?"

“(b) When such mortgages were taken for moneys invested by the executors?”

“7. Will the lands comprised in either class of mortgages mentioned in the preceding question, or the proceeds thereof, be divisible as lands in Ontario under the provisions of the will after default in payment of the mortgages, and (a) sale of land under the powers of sale in the mortgages, (b) after such mortgages are foreclosed?”

“8. If lands in Ontario held by the estate under said mortgages are sold under the powers of sale in the mortgages or are foreclosed, how should the proceeds thereof or the lands foreclosed be divided among the defendants?”

The material filed is not sufficiently explicit to enable me to deal with and dispose of some of these. It may be that the parties interested can now deal with them without further interpretation of the will or advice. If not, I may be spoken to after vacation, and after the further material necessary has been supplied.

The costs of all parties to the motion thus far will be payable out of the residuary estate.

The three daughters of the testator appealed from the judgment of Sutherland, J.; and Joseph Readman Lunness, the son, also appealed from the judgment in so far as it declared that the shares of the Canadian Pacific Railway Company owned by the testator were property situated in the Province of Ontario.

The appeals were heard by Meredith, C.J.C.P., Riddell, Latchford, and Middleton, JJ.

T. R. Ferguson, for the three daughters, contended that the [330] words “as hereinbefore set forth” in subclause 5 of clause 7 had reference back to subclause 2; that the words in subclause 5, “my said children,” meant the daughters only; that, upon the true construction of subclause 5, the testator divided his children into two classes, with the intention that the proceeds of all property in Ontario should be distributed equally amongst his daughters and the proceeds of all his property elsewhere should be distributed equally amongst his four children; that the learned judge below, having held that the son took no interest in property sit-

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uated in Ontario, erred in holding that the son took an interest in the proceeds of the homestead property, which was situated in Ontario; that the son had, since the death of the testator, by his conduct and acts construed the will according to the contention of the daughters, in that, since the death of the testator, the son had conveyed the property in question to the trustees, and by the same deed conveyed to the trustees part of his own property purchased from him by the daughters, and was estopped, by reason of his conduct, from asserting any contrary intention.

R. McKay, K.C., for the son, contended, in answer to the daughters' appeal, that subclause 2 applied only, in so far as the provisions in favor of the daughters were concerned, to property situated within Ontario in a narrower sense than that contended for by the daughters, and was confined to realty within Ontario other than that set apart for the benefit of the widow during her lifetime; and that, upon the death of the widow, this real estate and all the testator's personal property, save that specifically bequeathed, was divisible among the four children equally. Upon the son's own appeal he contended that the shares of the Canadian Pacific Railway Company were not locally situated in Ontario, but in Quebec, where the head office of the company was and where the shares were transferable. He referred to *Attorney-General v. Higgins* (1857) 2 Hurlst & N. 339, 157 Eng. Reprint, 140, 26 L. J. Exch. N. S. 403; *In the Goods of Ewing* (1880) L. R. 6 Prob. Div. 19, 50 L. J. Prob. N. S. 11, 44 L. T. N. S. 278, 29 Week. Rep. 474, 45 J. P. 376; *In re Clark* [1904] 1 Ch. 294, 73 L. J. Ch. N. S. 188, 52 Week. Rep. 212, 89 L. T. N. S. 736, 20 Times L. R. 101; *Attorney-General for Ontario v. Woodruff* (1907) 15 Ont. L. Rep. 416; *Woodruff v. Attorney-General for Ontario* [1908] A. C. 508, 24 Times L. R. 912; *Cotton v. The King* [1914] A. C. 176, at pp. 186, 195, 83 L. J. P. C. N. S. 105, 110 L. T. N. S. 276, 30 Times L. R. 71, 15 D. L. R. 283, at pp. 286, 293; *Rex v. Lovitt* [1912] A. C. 212, 81 L. J. P. C. N. S. 140, 105 L. T. N. S. 650, 28 Times L. R. 41; *Re Newcombe* (1918) 42 Ont. L. Rep. 590; *Treasurer of the Province of Ontario v. Pattin* (1910) 22 Ont. L. Rep. 184; *Attorney-General of Ontario v. Newman* (1901) 1 Ont. L. Rep. 511. [331] In the court below we attempted to put in evidence as to
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what the testator meant by "property," but it was not admitted by the learned judge.

R. U. McPherson, for the surviving executor.

Ferguson, in reply, on the question of the admissibility of evidence, referred to *Higgins v. Dawson* [1902] A. C. 1, 71 L. J. Ch. N. S. 132, 50 Week. Rep. 337, 85 L. T. N. S. 763. *In re Clark* [1904] 1 Ch. 294, 73 L. J. Ch. N. S. 188, 52 Week. Rep. 212, 89 L. T. N. S. 736, 20 Times L. R. 101, was not like this case, and was not a revenue case, as most of the other cases cited were.

Ribbell, J.: The will in question first makes certain specific bequests, and then devises and bequeaths "all my real estate of every kind and all my personal estate and effects whatsoever not otherwise disposed of by this my will" to the executors and trustees named upon trust:—

[The learned judge then quoted the six subclauses of clause 7 of the will, as above set out.]

The specific legacies are paid, and the widow is dead; the four children of the deceased are all *sui juris*.

The deceased had in Ontario real estate amounting to over \$8,000 in value; in Alberta, one lot worth about \$5,000; and in Saskatchewan, land worth about \$40,000. His domicile at the time of his death was Ontario; he had lived for some eleven years near Toronto, and had a place of business in Toronto.

A few years before his death, he had given to his son some \$43,000; at the time of his death he had 1,191 shares of Canadian Pacific Railway Company stock, the certificates for 219 of which he had in a safety deposit box in Toronto; and the question on this appeal is concerning these 219 shares, the daughters claiming that it is "property situated in the Province of Ontario" within the meaning of subclause 2 of clause 7, above set out, the son disputing this interpretation.

In the interpretation of wills the court is not troubled with many puzzling questions which arise in private international law, —the conflict of laws, as it is called, deals with property from an entirely different point of view and with an entirely different

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object. So, too, in cases of taxation of decedents' estates, the point of view and the object are wholly different.

In the interpretation of this, as of every other will, we must place ourselves in the testator's armchair and determine from the [332] language itself, under the circumstances, what he meant,—in this very little assistance can be derived from other wills. If, from the language employed and the circumstances, the meaning of the testator can fairly be made out, effect must be given to that meaning—unless it violates some rule of law—whatever may have been the interpretation placed by courts upon the words of other wills in the same or similar language.

From an examination of the will as a whole I am satisfied that when the testator speaks of property "situated in the Province of Ontario," he means his real estate. No doubt "'property' is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have" (Langdale, M.R., in *Jones v. Skinner* (1835) 5 L. J. Ch. N. S. 87, 90), and no doubt in a proper case the word will be so interpreted. But here I cannot think that the testator thought of his Canadian Pacific Railway Company stock as being "situated" anywhere,—“the expression of situation . . . is hardly apt for personal estate. I do not mean to say that personal estate is not situate somewhere—of course it is—but you do not find that word usually used in a will (as) passing personal estate.” Lindley, L.J., in *Hall v. Hall* [1892] 1 Ch. 361, at pp. 363, 364.

I think that in this will the testator, having real estate which could be and was in every sense situated in the Province of Ontario, meant that real estate by the expression employed.

The four children then, in my opinion, should divide this stock equally.

The son's appeal should be allowed; the costs may well be borne by the fund, as the litigation has arisen from the language employed by the testator himself.

Middleton, J.: Appeal and cross appeal from the judgment of Mr. Justice Sutherland, delivered on the 26th July, 1919.

Joseph Lunness died on the 3d November, 1915. His will,
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bearing date the 4th March, 1915, was duly admitted to probate. His widow, who survived him, died on the 5th May, 1919.

His estate, according to the inventory submitted upon the application for probate, amounted to the sum of about \$335,000, comprising among other things 1,191 shares of stock in the Canadian Pacific Railway Company, valued at \$221,377; lands in [333] Etobicoke (Ontario), valued at \$8,600; lands in Edmonton (Alberta), valued at \$5,000; and lands in Saskatchewan, valued at \$40,000. The remainder of the estate consisted of mortgages, cash, stocks, and cattle.

By his will the testator gave to his widow his furniture and household effects. He then gave to each of his three daughters 250 shares of stock in the Canadian Pacific Railway Company, and to his son 50 shares of the same stock. After some pecuniary legacies, not now of any importance, he devised and bequeathed all his real estate and all his personal estate, not otherwise disposed of by his will, to his executors and trustees upon trust to allow his widow to occupy his dwelling house and lands appertaining thereto during her life, and upon the further trust to pay her an annuity. Then follow the clauses giving rise to the present difficulties:—

[The learned judge quoted subclauses 2, 3, 4, and 5 of clause 7 of the will, as above set out.]

The daughters contend that, under the provisions of the will above quoted, the stock of the Canadian Pacific Railway Company is to be regarded as *situated* within the Province of Ontario, and that the proceeds of it, as well as the proceeds of the residence, are divisible among them. The son contends that the second subclause above quoted applies only, so far as the provision in favor of the daughters is concerned, to property situated within Ontario in a narrower sense, and is confined to realty within Ontario other than that set apart for the benefit of the widow during her lifetime; and that, upon the death of the widow, this real estate and all the testator's personal property, save that specifically bequeathed, is divisible among the four children equally.

Mr. Justice Sutherland, in a very carefully considered judgment, has concluded that the Canadian Pacific Railway Com-
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pany stock is property situated within Ontario, and is therefore divisible among the daughters to the exclusion of the son, but that the proceeds of the residence fall under clause 4, and are divisible among the four children. The son and daughters both appeal from the portions of the judgment adverse to their respective contentions.

I have come to the conclusion that the appeal of the son should be allowed and the appeal of the daughters should be dismissed.

[334] As I understand the will, the intention of the testator was that the great bulk of his estate should be divisible upon the death of his wife. He does not set apart a fund for the purpose of securing to her the annuity, but until she dies the bulk of the estate is to remain intact.

It is common ground that the testator was on most affectionate terms with all the members of his family, and that he had conferred some benefits upon his son. There is some conflict as to the extent of these benefits so conferred, but there is nothing to lead one to suppose that he intended to discriminate against the son beyond what was necessary to produce a condition of equality, having regard to the transactions which had taken place during his lifetime. This is the probable explanation for the greater benefits conferred upon the daughters by the clause dealing with the partial distribution of the Canadian Pacific Railway Company stock held by him.

It is, I think, erroneous to assume that the effect of subclause 2 is that the testator intended to classify all his property as being *situated* either in the Province of Ontario or in the Provinces of Saskatchewan and Alberta. He might have owned real estate within the Province of Quebec, and it clearly was not his intention that he should die intestate as to any part of his property. The devise to his executors and trustees is expressed in the widest possible terms. The true significance of subclause 2 is, as I think, to provide for a minor benefit to the daughters by permitting them to receive, at what he evidently thought was a comparatively early date, the proceeds of the property situate within Ontario. This I take to be realty, not because I attribute any narrow meaning to the word "property," but because the testator speaks here of *property situated in Ontario*. This word "*sit-*
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uated" is properly used only in connection with realty. See the judgment of Lord Justice Lindley in *Hall v. Hall* [1892] 1 Ch. 361, where, dealing with a gift of "effects wheresoever the same may be situate," he says (pp. 363, 364): "The expression of situation, 'wheresoever the same may be situate,' is hardly apt for personal estate. I do not mean to say that personal estate is not situate somewhere—of course it is—but you do not find that word usually used in a will passing personal estate."

The "property" situated in the Provinces of Saskatchewan [335] and Alberta, which is to be divided among the four children, I take to mean the realty situated in these provinces. It may also well include the cattle and farm implements owned in connection with the ranch; concerning these no question has been asked, and I express no opinion.

The third subclause speaks of the division authorized by the second clause as a "partial division of my estate," and provides that the balance of the income is to be equally divided amongst the four children. This, I think, again points to the fact that the great bulk of the estate is yet to remain in the hands of the executors.

The fourth subclause, authorizing the continuance of the business, is again followed by the same provision, "all share or profit received from the said business shall be divided equally amongst my said four children."

The fifth subclause, which, as I have already said, is, I think, the main provision of the will, provides that, after the death of the wife, the "real estate which was retained for her benefit and the balance of my property real and personal shall be sold and divided equally among my said children as hereinbefore set forth." I can attribute no meaning to these words other than an intention that the proceeds of all of this property shall be divided equally among the testator's children as hereinbefore set forth.

Much was said upon the argument as to the effect to be given to the words "as hereinbefore set forth." I do not think that the testator intended these to conflict with the word "equally," just as I would find in the proviso at the end of subclause 2 an explanation of their use. That proviso is "that if any child of mine shall

die in my lifetime leaving a child or children who shall survive me then in every such case the last-mentioned child or children shall take and if more than one: equally between them, the share which his her or their parent would have taken of my said estate if such parent had survived me and if any of my said children shall die without issue then the share or shares which should have gone to such deceased child shall be divided equally amongst my said children share and share alike."

Throughout the will there is a clear distinction between the daughters, who are only referred to as a class once, and the four children, who are referred to in almost every clause. Had the [336] testator intended any particular property to be divided among his daughters, he would have said so, and not referred to them as his "children." Where he intended the four to share, he invariably used the word "children."

Underlying the argument made on behalf of the daughters is, I think, the fallacious assumption that incorporeal property must be deemed to have a situs. That argument was based almost entirely upon the maxim "*mobilia sequuntur personam*." That maxim is used as a convenient statement of the rule of private international law with reference to the descent of personal property. The law of the domicile, the personal law, is to apply to those who take upon the death of the testator. In the same connection a situs is attributed to things that cannot have any real situs. Here the testator, when he used the word "situated," intended to use that word in the sense in which it is used and understood by ordinary people, equivalent to "located" or "placed with regard to its surroundings." The idea of a situs attributable to an incorporeal thing probably never crossed his mind, and it is as fallacious to me to suggest that he thought that the Canadian Pacific Railway Company stock was situated in Ontario, because perchance the script was in his strong box in Toronto, as to suggest that he regarded this stock as having a situation in the Province of Quebec, because the head office of the railway company was there.

I think it our duty to interpret the will by attributing to the words used their plain meaning, probably well understood by the testator, rather than by attempting to attribute to these words an

inaccurate and highly technical meaning, only vaguely understood by most lawyers.

For these reasons, I think the appeal of the son should be allowed, and that it should be declared that the Canadian Pacific Railway Company's shares and the proceeds of the homestead are divisible under the provisions of the fifth subclause of clause 7 of the will; that is, among the four children.

The appeal of the daughters should therefore be dismissed. Costs of all parties may well be paid out of the estate.

Latchford, J., agreed with **Middleton, J.**

[337] **Meredith, C.J.C.P.** Substantially stated, the questions involved in this appeal are:—

1. Who take, under the will in question, the testator's land, in Ontario, in which his widow had a life estate under the will? and

2. Who take, under the will, that part of the testator's stock in the Canadian Pacific Railway Company not specifically bequeathed in it?

The first step in considering these questions should be a careful perusal of the whole will, which is in these words:—

[The learned Chief Justice then set out the whole will, except the formal parts, as above.]

The testator died in the year 1915, leaving his wife and his children, three daughters and one son, surviving him. His widow died in the year 1919, a few days only before these proceedings were formally begun. The four children are all living.

The daughters contend that all of his property is part of the testator's "property situated in the Province of Ontario," which, under subclause 2 of clause 7 of the will, goes to them in equal shares.

For the son it is now contended that the property in question is not within the provisions of subclause 2; and that under subclause 5 of clause 7 it goes to the four children of the testator in equal shares.

To this contention the daughters reply that, even if subclause 5 applied, and subclause 2 did not directly apply, still they alone should taken the words "as hereinbefore set forth" at the end
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of subclause 5 governing it; and that those words mean "as set forth in subclause 2."

It is to be observed at the outset that no such contention as is now made in the son's behalf was made until after these proceedings had been launched; and that no such question as that which that contention raises is set out in these proceedings. The questions set out, regarding the construction of the will, are: whether the stock in the railway company is part of the testator's property situated in Ontario; which of the children are entitled to it; and whether the son takes under subclause 2 any share or interest in the property situated in Ontario: there was no suggestion that subclause 2 related to land only.

[338] Subclause 5 is not referred to. And it is also to be observed that, if the son's present contention prevail, all that has been done under the will in the way of selling the testator's personal property and dividing the proceeds under subclause 2 was a breach of trust, for which the executors are answerable.

And it is said that in that family court most competent to know the testator's real intentions—the whole of his family, the executors, and the family solicitor who drew the will—it was never suggested or thought of, by anyone, that the son had any share in the land that went to the widow for life or in any of the testator's property in Ontario; and that, indeed, the son joined in a deed of the land to make it plain that he had no claim upon it.

These things may not preclude him; and it may be proper to widen the scope of these proceedings so that any question, which any of the new legal advisers of any of the parties may now raise, should be considered, notwithstanding that they may cause a reversal of the position taken unitedly by all concerned and always acted upon from the time of the testator's death down almost to the present day, and may also cause great difficulty and confusion in giving effect to this newly thought of interpretation of the will; yet it would be a strange thing if we should be obliged now to tell them that they were all wrong in their confident judgment as to their own husband's, father's, and client's intentions.

In clause 7 of the will the property in question is, among all of the testator's real estate of every kind and all his personal estate and effects whatsoever and wheresoever, not otherwise disposed
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of by the will, given to his executors upon the trusts set out in the six subclauses of that clause. "*Contemporanea expositio est fortissima in lege*" is a maxim which may well be applied to this case. As to deeds it has long sagely been said: "Tell me what you have done under such a deed and I will tell you what that deed means." With greater force it may be said, in such a case as this: "Tell me what the whole household considered the meaning of his will to be, and I will tell you what the head of the household meant by his will." See *Watcham v. Attorney-General of the East Africa Protectorate* [1919] A. C. 533, 87 L. J. P. C. N. S. 150, 120 L. T. N. S. 258, 34 Times L. R. 481.

Under subclause 2 the executors are—after providing for the bequests before set out in the will—to sell "any or all of my property situated in the Province of Ontario at any time in their [339] discretion within ten years," from the date of the testator's death, and to divide the proceeds equally among his three daughters.

All such bequests having been provided for, and the widow being dead and the ten years being unexpired, why should not the lands in question be sold and the proceeds divided equally among the testator's three daughters, as this subclause provides? Like the family court's mind, mine does not contain a doubt of the daughters' rights to this property under that subclause of the will.

Unless the mind desires to make subclause 5 repugnant to subclause 2, how can any real conflict between them appear or seem to be?

Naturally, in minds ignorant of all things that actuated the testator, except that he has given much to his daughters and comparatively little to his son, there is a strong repugnance to the unequal division and a natural inclination to transfer that repugnance from the mind to the will, especially when nothing is said against the ability or character of the child who gets the smaller portion; though in truth it may be that it was just because of good ability and good character, and the father's faith in his son's ability to be as successful in life as the father had been, or more so, that the lesser gifts to the son were made; so that his ability and ambition should be spurred into action rather than

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cloyed with the honey-of idleness and self-indulgence—good or bad—induced by “found,” not earned, money.

But though knowledge of such things is generally in the family court, it is not here; and all that this court should do is to guard against any speculations regarding them, and against giving effect to anything but the will of the testator expressed in his words, which I have read at length.

The controlling words of subclause 5 are, “as hereinbefore set forth;” and those words are really made of no effect unless they are read as referring to subclause 2. There is no escape from that; the words “as hereinbefore set forth” are useless unless they mean as set forth in subclause 2; whilst, if read as referring to the provisions of that subclause, there is not a shadow of repugnance, but the whole scheme of the will, and every clause in it, work together in harmony. It cannot be said even that subclause 5 is superfluous; because, although subclause 2 is very wide in the [340] power and direction to sell and divide the estate, contained in it, yet it does not provide for a sale or division of that part of the estate which must have remained undisposed of if the widow had outlived the space of ten years the time limit of the power to sell and divide under subclause 2.

The objections now made to this interpretation of the will seem to me to be insignificant.

It is true that the word “equally” in subclause 5 is not really necessary for that interpretation of the will, but it is at least quite as superfluous in any other interpretation of it. Giving it the meaning of, “according to the qualities set out in subclause 2”—that is, as to property in Ontario, equally between the three daughters only, and as to property in Saskatchewan and Alberta equally between the four children—its use is more than excusable: and it is always to be borne in mind that the will was drawn by a member of the legal profession who has, for a number of years, been a practising barrister as well as solicitor.

On the other hand, if subclause 5 were intended to provide for a division the same as is provided for in subclause 4 of subclause 3, the introduction of the word “equally” as well as the words “as hereinbefore set forth” could have no purpose or effect—one or other is superfluous and inexcusable.

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Subclause 4 does not aid the son; it accentuates the testator's intention throughout to give the much greater portions to the daughters; so much greater, as to the bulk of the estate which was specifically bequeathed, as 750 shares of stock, valued at \$185,87½ each share, to the daughters, and only 50 to the son. The testator's interest in the business mentioned in this subclause had a value in money of only \$200, as appears in the papers under oath which led to the grant of probate of the will; so that all the profit which might be derived from that business would come from the son's management of it, and yet the profits so earned were to be equally divided between him and each of his three sisters, in equal shares.

It is true that in a subclause 3 the division of the testator's estate is called a "partial" division; but until someone is able to suggest a single word that would better express it, whatsoever interpretation may be placed on subclause 2, fault cannot reasonably be found with the draftsman of the will for employing it.

[341] The division must be partial until complete; and, as the property would be sold and divided from time to time extending over the ten and the five years, for some length of time, the word "partial" might seem to have too wide a ring, though quite accurate; and it must not be forgotten that if the widow outlived the space of ten years there never could be anything but a partial division under subclause 2. The more minute one becomes in discussing this will the more one should become impressed with the vision of the draftsman.

It may be well now to deal directly with the new contention made in the son's behalf, to give effect to which would substantially nullify the provisions of subclause 2; and to give concisely some direct reasons why I am unable to give any effect to it.

The contention is that the subclause relates only to the testator's land. But why?

It cannot be because the learned draftsman of the will and the testator have said "any or all of my property." It ought not to be necessary to refer anyone, learned or unlearned, to the statement made by the Lord Chancellor and repeated by Lord Justice Cotton, in the case of *In re Prater* (1888) L. R. 37 Ch. Div. 481, 483, 486, 57 L. J. Ch. N. S. 342, 58 L. T. N. S. 784, 36 10 B. R. C.

Week. Rep. 561, that "the word 'property' is as wide as anything can be."

In an affidavit of the son, filed in this matter, he states that he has no recollection of his father ever having used the word "property" in relation to anything but real estate.

The learned judge who heard this case in the first instance properly rejected this evidence; there is no ground of any kind for the introduction of such testimony; and, if there were, that introduced would be useless; the plain meaning of a plain word could not be perverted upon such an affidavit by one so interested in perversion.

There is no ground for the assertion that anyone, not to speak of the capable testator or the learned draftsman of the will, thinks the word "property" applicable only to land; if there were any ground for believing that any ignorance exists respecting its meaning, it may be that that ignorance would be in thinking the opposite. Let anyone test it by asserting to any owner, however unlearned, and whether male or female, that his or her cow, or household furniture, bought and paid for, is not his or her property, and await the result.

[342] If there could have been any excuse for attributing such inconceivable ignorance to anyone concerned in the making of this will, the will itself should have presented it; for, in it, far more than such knowledge is made plain in the words "my property real and personal" contained in the short subclause 5, so much relied upon in the son's behalf.

That the testator could not have meant land only seems to me to be very evident; because, to reach that conclusion, the plain meaning of a plain word written by a competent writer must be distorted; because the whole will shows an intention that the whole estate was to be converted into money and the money given to the beneficiaries without any needless delay—except to protect the widow's interests, there was no reason for any delay, because he had no land in Ontario that could be sold—all that he had was the homestead estate which was willed to the widow for life; and because he could not have meant that his farms in Saskatchewan and Alberta should be sold and their live stock, farming implements, and other farm chattels retained: he would have pro-

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vided that the chattels also should be sold within the five years, and most likely would "give the tail with the hide."

The contention that the words "as hereinbefore set forth" refer to subclause 2, but only to the latter words of it, is very like a surrender of the son's claim; for, if to that subclause at all, why not the whole of it, what justification for separating the latter from the former, when the learned draftsman of the will did not, with more than a comma, and has connected them inseparably by the words "provided always," etc., and it is impossible for me to believe that the learned draftsman of the will could have drawn it as it is, if what is contended for were intended. At the least he must have said, "but in case of the death of any of them in my lifetime leaving children such children are to take in the manner hereinbefore set out." There is no ground for attributing to him illiteracy.

I find no difficulty in reaching the conclusion that the provisions of subclause 2 must govern, whether the rights of the parties arise directly under it or indirectly under the words "as hereinbefore set forth," contained in and which govern subclause 5: and accordingly I am in favor of allowing the appeal.

The cross appeal raises the second question before set out; and [343] as to it I find no difficulty in reaching the same conclusion as that reached and given effect to by the judge of first instance.

The shares of the stock in question were represented by stock certificates held by the testator, and, for safe-keeping, deposited with his bankers in Toronto.

When such shares are sold, the transaction is ordinarily closed by the seller's broker handing to the buyer's broker the certificates with the printed form of assignment always on the back of them, signed without being filled in, and payment of the price; the next seller concludes the sale by mere delivery of the certificates so indorsed, and so on; and it is not until some purchaser buys for investment, and desires to be registered as owner, that the registration is changed, which is done by the simple process of filling his name in the blank assignment indorsed on the certificate and sending it to the company for registration. So that, for practical purposes, the certificates are properly treated as if they were the shares; and few concern themselves with the technical

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legal aspect of ownership. To say to a business man that his certificates are not his "property," situated wherever they may be kept, could but excite derision. They are, for all practical purposes, his certificates, his shares, and his stock in the company. The stock is personal property, and the owner of shares can, when he pleases, compel registration. See *Canada National Fire Insurance Co. v. Hutchings* [1918] A. C. 451, 87 L. J. P. C. N. S. 106, 118 L. T. N. S. 484, 34 Times L. R. 225, 39 D. L. R. 401.

This question does not depend upon any technical rule of law, but is to be determined by that which the testator meant. And, if it did, how could there be anything extraordinary in applying to a case of testacy the same rule as is applied in a case of intestacy? It is wrong to say that the daughters base their claim upon technical rules; it is right to say that, if the son rely upon the technical rule that movable property generally, or such property as that in question in particular, can have no abiding place, the daughters reply that then the property in question followed the domicile of the testator, and was therefore property situated in Ontario. But, as I have said, the only governing question in this case is whether the intention of the testator, expressed in his will, is that the stock in question should pass as part of all his "property situated in Ontario;" and that he did so intend seems to me to be plain.

[344] The great bulk of his estate consisted of such stock, and it was all represented by the certificates in his possession, which could be transferred almost as readily as if they were bank notes, "bearer bonds," or other like property.

Then it is obvious that the testator intended to dispose of all his property by his will; and equally plain to me that he thought all his property of every nature and kind was "situated" in one or other of three provinces named in his will; and, that being so, to him the shares of the stock in question must have been "situated" in Ontario.

The word "situated" is one of very wide meaning, and may quite as well be applied to goods as lands; indeed, as I have no doubt, rather more generally applied here to goods, the more favored words connected with land being "located" and "locatee,"

as the mining and Crown lands enactments of this province, among many things, show.

It is impossible to read the whole will and to retain even the most flickering suspicion that the testator knew or had any thought that the bulk of his property was situated in the Province of Quebec, and I am far from being able to find, or consider, that it was.

In fact a very great part of the railway is situated in Ontario, a fact of which no one can be in ignorance, or can forget, because it is everywhere to be seen and heard, and is in constant use, by the inhabitants of the province.

These things must be considered in a practical manner; and can anyone doubt that if the testator had been told that the bulk of his property was situated in the Province of Quebec he should have thought, even if he had the knowledge of a lawyer, that his informant was a very unpractical person?

It may be observed that the word "situated" is a superfluous word; the meaning of the subclause would be just the same without as it is with it.

The case to which I have referred—*In re Prater* (1888) L. R. 37 Ch. Div. 481—is distinctly in the daughters' favor, though decided in England, where formalities are perhaps more adhered to than here.

In that case the Court of Appeal, presided over by the Lord Chancellor, unhesitatingly decided that the words "my property at Rothschilds' bank" included shares in the stock of a company; [345] and in that case Lord Justice Cotton (p. 486) made use of these words, which are singularly appropriate to this case: "'Property' is a word of the very largest description, and looking at this will I see nothing to cut it down to 'money' so as to make it pass only the bankers' balance. Though people would not ordinarily describe a cash balance at their bankers' as property at their bankers', yet they might do so, but why may not the testator so describe these shares, which are not really property at his bankers', but are so in this sense, that the certificates without which the title to these shares cannot be asserted are in the hands of the bankers?" And again (p. 487): "There is a wide difference between real estate having a particular locality, and

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shares, which may, I think, be described by any person not having any great legal knowledge as in the place where the certificates are."

Under all the circumstances of the case, the costs of all parties might not unjustly come out of the estate "situated in the Province of Ontario."

Judgment below varied (Meredith, C.J.C.P., dissenting).

Note.—Devise or bequest of "property situated in" a certain place as including incorporeal personalty.

Based on the few cases which have passed on the question here considered it may be stated that incorporeal personalty has no locality, and is not included in a devise or bequest of "property situated in" a certain designated place. *Re Alexander* (1898) 28 Pittsb. L. J. N. S. 465; *Re Lazarus* (1919) 121 L. T. N. S. 491, 88 L. J. Ch. N. S. 525; *RE LUNNESS* (reported herewith) *ante*, 424.

It will be observed that in the reported case (*RE LUNNESS*), where the testator, a resident of Ontario, made his will disposing of his "property situated in the Province of Ontario," the will was construed to refer to real property in Ontario only, and not to include personalty in the shape of shares of Canadian Pacific Railway Company stock kept in a safe-deposit box in the Province of Ontario. The court held the maxim "*mobilia sequuntur personam*" to be inapplicable, and Middleton, J., stated that the word "situated" was properly used only in connection with realty, and that the testator used the word in the sense in which it is used by ordinary people, that is, the equivalent of "*located*," and that the idea of a situs attributable to an incorporeal thing probably never crossed his mind.

And in *Re Alexander* (1898) 28 Pittsb. L. J. N. S. 465, where a testator bequeathed to her sister all her "real estate and personal property in the borough of Sewickley . . . and situated in Broad street," it was held that even if a note due the testatrix had been in her house in Broad street at the time of her death it would not have passed if it was her intention to limit the bequest to personal property in the Broad street house. The court said: "In Jarman on Wills, 712, it is said that 'choses in action have no locality, and will not be included in a bequest of all the property in a certain locality.' And in 2 Wms. Exrs. 7th Am. ed. 461, 462, that 'where the bequest is of all my goods at a particular place . . . bonds and other choses in action do not pass, nor will they pass by a bequest of "all things" in a particular house.' 'A bequest of chattels in a house will not pass choses in action such as bonds or securities for money in the house, which are considered not property in the house, but evidence

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of title to property elsewhere.' Theobald, Wills, 3d ed. 151. So that even if the Armstrong note had been in the testatrix's house at the time of her death, it would not have been included in the bequest to her sister, if it was the intention to limit it to the personal property in the house on Broad street. If the designation of location refers to both the personalty and realty, there could be no doubt that it was intended that the gift should be so limited. But such a construction of the will would, in addition to the life estate in the Broad street lot, only give the legatee household furniture of little value, and the provision would be inadequate to support her comfortably." The court in this case, after considering the facts and circumstances, held that the words "real estate" and "personal property," as used in the provision of the will, should be transposed, so that the provision with reference to location did not apply to the personalty.

In *Re Lazarus* (1919) 121 L. T. N. S. 491, a testator, domiciled in South Africa, bequeathed so much of his estate as should be "situated in or invested in England or Great Britain at the date of his decease," and he died possessed of leaseholds in England and stocks and bonds in companies outside of Great Britain, which were in the hands of his agents in Great Britain. It was held that the word "situate," as used, by the testator, was satisfied by the leasehold property in Great Britain, and the court confined itself principally to a discussion of the meaning of the phrase "invested in Great Britain;" but it was of the opinion that the bonds were not a part of the estate "situated" in England or Great Britain. With reference to this Duke, L.J., said: "I think that there is no real difficulty about the first question, which is whether these securities were part of the estate of the testator situate in or invested in England or Great Britain—situate in or invested in the specified region. I cannot conceive that in a will simply expressed, as, on the whole, I think this will is, it is possible to say that the presence of the scrip certificates in London determines the locality of the estate. It is contrary to a defined principle, which for many generations seems to have been regarded as correct, that choses in action have no locality."

And in a somewhat similar case, *Moore v. Moore* (1781) 1 Bro. Ch. 128, 28 Eng. Reprint, 1030, a will providing, "I give all in Suffolk to R. Moore Esq., I give R. Moore Esq., all my goods and chattels in Suffolk," was held not to pass a bond which was in the testator's house in Suffolk, the court holding that the bond had not the sort of locality which was within the idea of the testator.

Attention may also be called to *Fleming v. Brook* (1804) 1 Sch. & Lef. 318, 9 Revised Rep. 35, where, relying on *Moore v. Moore*, *supra*, it was held that neither a mortgage, bond, nor bankers' accountable receipts, passed under a will bequeathing all "my property, of whatever nature or kind the same may be, that shall be found in
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my house in Duke street except a bond of F. M. Esq., in my writing box in the said house contained," the court holding that choses in action have no locality, and that the exception of the bond was not sufficiently strong evidence of the testator's intention to pass the other choses in action.

In *Merrill v. Winchester* (1921) — Me. —, 113 Atl. 261, it was held that notes, mortgages, certificates of stock, contracts of sale of real estate, and checks found in the house at the testator's death, having an appraised value of nearly half a million dollars and forming nearly one half of testator's entire estate, were not included in a bequest of "all articles of personal property in said house not herein otherwise disposed of."

And in *Central Union Trust Co. v. Flint* (1921) 198 App. Div. 703, 191 N. Y. Supp. 46, it was held that an obligation of the devisee to the testatrix, which was found with other papers in the attic of her house, did not pass under a devise of the testatrix's residence, "together with all the contents of the said house, with the exception of articles hereinabove bequeathed to others," on the ground that as the gift itself was not of a residuary character, and as there was a residuary clause in the will, a broader construction was not required in order to avoid a partial intestacy, and that a subsequent paragraph of the will, by which testatrix gave to such devisee all her silver, linen, glass, and jewelry, requesting him to dispose of it in accordance with a letter of instructions which she intended to leave, indicated an understanding that the bequest of the contents of the house did not necessarily include everything therein.

In *Ritch v. Talbot* (1901) 74 Conn. 137, 50 Atl. 42, where a testator, living in Greenwich, devised to his nephew "all my real and personal property situated in Gaylordsville, it was held that by personal property" he intended debts due from residents of the town mentioned, which were secured by a mortgage on land adjoining that devised to the nephew. The court said: "By the second clause of the will the testator gives to his nephew, John Talbot, 'all my real and personal property situated in Gaylordsville, Litchfield county, and state of Connecticut.' In view of the facts appearing in the record, we think the testator intended by 'personal property' to include the debts due him from residents of Gaylordsville. These debts appear to be all the personal property he had, except his household furniture and the money in bank mentioned in the inventory. His nephew, John Talbot, was the only one of his relatives who had lived near him, and to whom he made any specific gift. The mortgage debt, which forms substantially the whole of the debts due from residents of Gaylordsville, was secured by mortgage on land devised to his nephew, and the intent to give him that mortgage debt in connection with the land adjoining that securing the debt might be ex-
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pressed by the phrase, 'all my real and personal property situated in Gaylordsville.' It is true that ordinarily, and in the absence of any modifying legislation, the situs of a debt follows the person of the creditor. In the case of mortgage debts especially, the residence of the debtor, as well as the place where the mortgage securities are held, have in some jurisdictions been treated for certain purposes as the situs of the mortgage debt. But in common language a debt is not infrequently spoken of as being property at the residence of the debtor, especially when secured by land there situate. The question before us is not one of legal situs, but of what the testator, under the circumstances of this case, meant when he spoke of 'all my real and personal property at Gaylordsville.' "

J. T. W.

[SUPREME COURT OF CANADA.]

THE WINNIPEG ELECTRIC RAILWAY COMPANY

(Defendant), Appellant,

and

THE CANADIAN NORTHERN RAILWAY COMPANY

(Defendant), Respondent,

and

ANDREW JACKSON BARTLETT, Plaintiff.

59 Can. S. C. 352.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Carriers — Street railways — Negligence — Dangerous situation at railroad crossing — Joint liability.

A street railway is guilty of negligence rendering it jointly liable with a railroad company where, after its car had stopped at a crossing as a train was approaching, it was started across by the motorman without a signal from the conductor when the train was approximately 75 feet away, and after the car was halfway over the track its speed was suddenly increased and two ladies at the rear end were either thrown, or jumped off, and were killed by the train.

Railroads — Negligence — Street car approaching crossing — Dangerous situation — Inability to anticipate manner in which accident occurred — Joint liability.

Although the manner of the happening of the accident could not have been anticipated, a railroad company was guilty of negligence rendering it jointly liable, where one of its trains, approaching a much-used crossing, was traveling slowly, and after a dangerous situation was seen to exist on account of the attempt of a street car to cross

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could, by prompt action, have been stopped in time to have avoided the accident, but continued on its way and ran over and killed two passengers, who either jumped or were thrown from the rear of the street car, which by a sudden increase of its speed crossed in safety.

Idington and Brodeur, JJ., dissenting.

(November 10, 1919.)

Present: Idington, Duff, Anglin, Brodeur, and Mignault, JJ.

[353] APPEAL from a decision of the Court of Appeal for Manitoba (1918) 29 Manitoba L. R. 91, 43 D. L. R. 326, sub. nom. Bartlett v. Winnipeg Electric R. Co., affirming the judgment at the trial against the Electric Company and in favor of the Canadian Northern Company.

The facts are sufficiently stated in the above headnotes.

Tilley, K.C., for the appellant:

The respondent could have stopped its train in time to avoid the accident, which must, therefore, be ascribed to its negligence. See *City of Calgary v. Harnovis* (1913) 48 Can. S. C. 494, 15 D. L. R. 411; *British Columbia Electric Ry. Co. v. Loach* [1916] 1 A. C. 719, 85 L. J. P. C. N. S. 23, 113 L. T. N. S. 946, Ann. Cas. 1916D, 497, 23 D. L. R. 4.

O. H. Clarke, K.C., for the respondent cited *The Bywell Castle* (1879) L. R. 4 Prob. Div. 219, at pages 223 and 227, 44 L. T. N. S. 747, 28 Week. Rep. 293, 4 Asp. Mar. L. Cas. 207; *The Tasmania* (1890) L. R. 5 App. Cas. 223, at page 226, 63 L. T. N. S. 1, 6 Asp. Mar. L. Cas. 517; *Weir v. Colmore-Williams*, 36 New Zealand L. R. 930.

Idington, J., dissenting: This is a remarkable appeal. The appellant and the Canadian Northern Railway Company, which I shall for brevity's sake hereinafter designate respectively the "Electric Railway" and "Steam Railway," were sued for damages arising from the death of the wife of the respondent administrator, alleged herein to have been caused by the negligence of both or one of the said railway companies at a point where their respective tracks cross each other in Winnipeg.

The declarations of the plaintiff therein alleged sufficient to
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constitute grounds of action which might render both or only one of said companies liable.

[354] And the defendants each by its pleading not only denied the allegations made in the declaration as against itself, but also alleged contributory negligence on the part of the deceased.

The plaintiff in reply denied each of these allegations of contributory negligence, and joined issue.

The defendants each agreed with plaintiff before the trial that he was entitled to a verdict for \$6,000 and \$300 costs, and reduced this to writing. The respective counsel for plaintiff and defendants at the opening of the trial announced the fact of settlement and the disposition of the case made thereby, and that there was nothing to be tried except this subsidiary question of whether or not either defendant was solely to blame or they were both liable.

No amendment of pleadings was made and nothing definitely settled in that regard.

Inasmuch as each of the companies in its pleading had carefully abstained from alleging anything against the other, how can we hold this an appealable case?

If the case had proceeded in the usual way of the plaintiff proving, or attempting to prove, his case, then there might have arisen incidentally thereto ample grounds for adducing evidence, which would have disposed of such an incidental issue, but how there can be said to have been a trial of that sort of case made, I am unable to see.

To make matters worse the settlement agreement, which one of counsel said would be filed, is neither printed in the case presented to us, nor to be found in the record.

The novelty and difficulty of such a situation seems to have occurred to the learned trial judge, and respective counsel for each of the companies.

[355] The following seems to cover all that there is in the final result of the discussion:

Mr. Clark: It would be better for us to have this understanding that neither party be bound by the pleadings in this case, because practically a new issue has arisen now.

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His Lordship: I do not see why you should not leave the pleadings as they stand, subject to any amendments you may suggest, because I cannot try the case without any pleadings.

Mr. Clark: Then we will go on, it being understood that neither party will hold the other down to the pleadings.

Mr. Guy: I would very much prefer that the Canadian Northern Railway Company put in their evidence first. When the question of the settlement was discussed, there was a question as to which one would put in his evidence first.

Mr. Clark: I was not present then.

Mr. Guy: And the question was left open.

His Lordship: Is it material? You are both defendants.

Mr. Guy: We were not in a position to have an examination for discovery, and in order for me to proceed, it may be necessary for me to prove my case by calling employees of the Canadian Northern Railway Company, and I do not want to do that and be bound by their evidence.

His Lordship: They are in the same position.

Mr. Guy: Yes, but I don't think their case is affected in the same way as our case is.

His Lordship: I think you had better proceed with the evidence and do the best you can. It is a very unusual kind of a case, and we are dealing with it in an unusual manner.

So far as I can find there was no amendment of any kind to the record of pleadings.

The formal judgment gave the plaintiff a recovery of \$6,300 against the Winnipeg Electric Company, and then dismissed the action as against the Canadian Northern Railway Company, and awarded the latter, as against the former, its costs of this action.

I regret the actual situation I have thus outlined was not presented to us, or present to my mind, intent on hearing what counsel had to say.

I am so much impressed with the nature of such a trial of an issue not raised by the pleadings being one by a court chosen by the parties as *persona designata* and hence nonappealable, that if I could come [356] to the conclusion that both courts below, upon what was tried, have erred in mere concurrent finding of the facts,
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I should have desired to hear argument on the question before so determining.

I have considered all that was argued as to the facts and relevant law.

I am, after reading not only all that we are referred to, but also much more of the evidence, unable to see wherein the courts below can properly and judicially be now held to have erred.

As quite natural in such an extraordinary and shocking exhibition of foolhardy conduct on the part of the men in charge of the car that ventured to cross under the circumstances presented, the witnesses were liable from mere excitement, and haste due thereto, to give inaccurate and unreliable estimates of distances.

One can pick out, if he discards all else, quite enough in the evidence to constitute grounds for holding the Steam Railway Company not only liable, but also solely liable.

Any such conclusion would seem to disregard the impressions of fact which a great many people, no doubt better placed than we are to appreciate the local situation and hence be probably seised of the right view of the facts, would receive.

It appears on the case before us that several duly constituted authorities had acted in a way quite contrary to what one would expect if the "Steam Railway" Company was alone to blame.

And then we have, in accord with the action of these other authorities, a view taken by the learned trial judge of the facts presented to him at the trial, for which there is ample ground, and that maintained by a court of appeal consisting of three judges, [357] all from local knowledge of the situation having an advantage over us, unanimously concurring in the finding.

I cannot, without anything conclusive and uncontradicted to guide me, save in one particular which I am about to refer to, reverse such a finding, which ought not to be controlled, any more than the verdict of a jury, by us here, unless we can find undisputed facts and circumstances which beyond reasonable doubt would demonstrate error on the part of those making such concurrent findings.

The fact that appellant's argument is made only to turn upon its view of a very narrow margin of time and space, ascertained from guesses of fact, makes one pause.

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I have been unable to find from which side of the electric car the deceased jumped or was thrown, and yet that fact alone, if I apply experience and common sense, would make a possible difference in what we are asked to deal with, of 10 or 12 feet.

Nobody at the trial, I venture to think, deemed that the issue could reasonably be decided upon a calculation or finding of such a narrow nature as it is to be herein, unless upon our holding that every car in the "Steam Railway" train must, by law, be linked up by the air brakes and the use thereof applied with the utmost celerity, on pain of those applying them being possibly held liable to conviction of a charge of manslaughter in such events as presented herein.

As to the engineer acting upon the signal given him by his brakeman, I accept his story, and as between two statements prefer his to that of the brakeman, who was placed in a distressing situation, which probably accounts for the evident doubts, [358] inaccuracies, and inconsistencies that exist in his evidence.

The only conflict pressed herein was whether or not the engineer acted on the first emergency signal given, or the second a few seconds later. The engineer swears he was looking and acted promptly. He knows probably better than a brakeman what time is necessarily lost in the operation.

Section 264, subsection 3, of the "Railway Act" then in force, reads as follows:

"3. There shall also be such a number of cars in every train equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed, or bring the train to a stop in the quickest and best manner possible, without requiring brakeman to use the common hand brake for that purpose."

Then follows subsection 4, which renders it imperative to have, in the case of passenger trains, a continuous system of brakes applied to the whole train capable of being applied by engineer or brakeman instantly.

It seems the connection in the case in question was only between the engine and tender which those in charge had deemed sufficient for the service which was to be performed.

The witnesses explain why, in the shunting operations, on which they had been engaged, it was deemed impracticable to have brakes on each car to be shunted connected with the tender.

There is a discretion evidently permissible under the act in that regard. And the weight of the evidence clearly is that, so far as concerned the train in question running at the slow rate it was, the said method adopted herein of bringing into effect the air brake was usually sufficient.

The test of highest possible efficiency and results known to be got therefrom, as testified to by an expert, [359] does not seem to me a fair one or such as the statute imperatively requires in such circumstances as in question.

Each case must be determined upon the circumstances in question as to how far beyond the connection of the air brake with the tender its connection is to be extended and to be made with the other cars, and may be reasonably necessary.

The courts below have held that the connection adopted was in this case sufficient for the required efficient service being performed with such a train. I am unable to say they erred.

It is to be observed that though citing the decision in the case of *Muma v. Canadian Pacific R. Co.* (1907) 14 Ont. L. Rep. 147, the Court of Appeal does not rest upon that, but upon the result of applying the facts in question herein.

I may point out that the decision in the *Muma Case*, *supra*, proceeded upon the "Railway Act" when, in this regard, different from that now in question. The act has been so amended as to make the law in question much clearer.

The rigid enforcement of the statute, or any other statute designed to protect life and property, I hold to be imperative. But reason must be applied, and when it comes to a minute calculation of how many, or few, feet and seconds are involved in the application of the law, we must decide reasonably.

Fifteen seconds was the guess of one man as to the time involved, and so many as 15 feet in falling short of safety in performance is the guess of appellant's argument, and all dependent on the guesses of naturally excited people, unless as to one man who claims he was so cool and collected that he sat still and could [360] by the eye measure, when looking from a moving car

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crossing at right angles the path of the moving train, its exact distance from his car.

The primary gross negligence of the appellant as the *causa causans* of that which is complained of, and in the circumstances was the natural consequence, is unrelieved by the interposition of independent responsible human action, and is all too obvious to be swept aside by any such guesses if the appellant is not to be allowed to escape having justice meted out to it.

The same proof of reasoning would lead to absolving both companies on the ground they each set up of contributory negligence; for, as I may repeat, why could not the unfortunate ladies have picked themselves up in four or five of these fifteen seconds of time which they had?

For aught we know their necks were broken and they dead already, as the result of appellant's car jerking them off.

And if we had to decide this case as against the "Steam Railway" we would have to ascertain exactly the measure of damages each company was responsible for.

There is no room for joint liability.

Their acts were distinctly separate and each responsible for the consequences of its own conduct, and dependent in part upon the application of distinctly different principles.

I need not elaborate this and illustrate how the law has stood, at least ever since the case of *Davies v. Mann* (1842) 10 Mees. & W. 546, 152 Eng. Reprint, 588, 12 L. J. Exch. N. S. 10, 6 Jur. 954, 19 Eng. Rul. Cas. 190, was so long ago decided.

The court below does not go further than to find upon the peculiar circumstances in this case that [361] there was no negligence of respondent which led to the accident.

On that view of facts I am not able to reverse.

This case was one for the application of sound sense, and not finespun theories of what might have been, and I am sure the former was applied and guided the courts below.

Hence I would dismiss the appeal, with costs.

Duff, J.: This litigation arises out of a most regrettable accident in which the deceased wife of the plaintiff, Andrew Jackson Bartlett, was run over by a train of the respondent company and
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killed. Mrs. Bartlett was a passenger on a car of the Winnipeg Electric Company on Portage avenue, which crosses the Canadian Northern track. She and two other passengers were thrown from the car onto the railway track in front of a freight train the front truck of which passed over Mrs. Bartlett's body. The surviving husband sued both companies, charging both with negligence. The claim was settled, but the litigation proceeded for the purpose of determining whether both or only one, and if so which, of the companies, was properly chargeable with the negligence that was the real cause of the accident. On the facts the negligence of the Electric Railway Company was not seriously open to dispute. Mr. Justice Galt, who tried the action, and the Court of Appeal from Manitoba, unanimously acquitted the railway company of negligence.

Negligence or no negligence is, of course, a question of fact, and the two courts have pronounced in favor of the railway company upon that issue. The judgment is, therefore, one which ought not to be disturbed unless the appellant has clearly established error in [362] some specific matter and error of such importance as to vitiate the conclusion of the courts below. Careful judgments were delivered by Galt, J., and by the Chief Justice of Manitoba in Court of Appeal. I have examined these judgments closely, and, with very great respect, I am unable to escape the conclusion that they cannot be sustained.

Portage avenue is a much-used thoroughfare, traversed, as already mentioned, by an electric car line. As the Canadian Northern train which was made up of a number of cars preceding and a number of cars following a locomotive approached this street, it was the duty of those in charge of the train to exercise great caution and particularly to be on the alert for the perception of any dangerous situation which might arise as the train reached the street car track. There is a rule of the railway company governing this crossing, requiring trains to stop at least 100 feet before reaching the Winnipeg Electric Company's tracks, and requiring them not to proceed until a proper signal is received from the signalman, or from one of the train crew "located in a proper position" on the crossing.

It is not very material for the purposes of this appeal whether

this instruction does or does not strictly apply to a train of this character,—which, it is alleged, was engaged in a shunting operation. The instruction is valuable evidence of the view taken by competent persons responsible for the working of trains approaching this crossing as to the kind of precaution necessary to obviate the risks incidental to the running of a train over it.

The grounds of Mr. Justice Galt's judgment are indicated in the following passages quoted textually from his reasons:

[363] "When it was about 75 or 100 feet from the crossing the motorman of the electric car, without having received any signal from the conductor, started his car to get across before the train arrived. As I have said, the situation was perfectly apparent, and some of the people in the car, seeing the freight car coming towards them, got alarmed and moved towards the door at the rear end of the car. Amongst these people were two ladies; one of them was Grace Jane Bartlett, wife of the plaintiff.

"By the time the electric car reached the diamond crossing the freight train was perhaps within 30 or 40 feet of the car. The evidence (to which I will allude more particularly hereafter) showed that at this juncture the brakeman, who was stationed on the front freight car, shouted to the motorman to get across. Whether the motorman heard him or not does not appear, but there is evidence that the car, which was ahead in motion, started forward with a jerk and the two ladies either stepped off hurriedly, or were thrown off the rear steps of the car, and fell on the diamond crossing. The brakeman on the freight train had already given a violent signal to the engine driver to stop, but the freight train was not completely stopped before the front truck of the freight car had run over the two ladies and inflicted such injuries upon them that they both died.

"Then again it was argued that the steam railway was negligent,—that the engineer did not apply his emergency brake to the engine soon enough. It is quite possible, and the evidence seems to indicate, that the engineer missed the first violent signal given by the brakeman; but the engineer had no reason to expect such a signal and had every reason to suppose that the way was clear.

"As I read the "Railway Act" and the rules and regulations

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applicable to these defendant companies, I should certainly say that at the time in question the steam railway had the right of way across Portage avenue. Even if it had been otherwise, the action of the motorman of the electric car in approaching the crossing and then stopping operated as an invitation to the engineer of the freight train to continue on his course. The whole trouble was caused by the frantic haste of the motorman to get across the diamond before the freight train."

The opinion of the learned judge that the train was about 75 or 100 feet from the crossing is affirmed by the Court of Appeal and is fully supported by the evidence. It does not appear to be necessary for the purpose of deciding the appeal to discuss or to consider any of the earlier incidents. When the motorman was seen by the brakeman to be starting his car across the track, a situation full of grave risk arose if the train were not stopped. The brakeman must have [364] realized this if his story is to be accepted, because he had already given a signal to stop the train, and he says that in doing so—although he had the rule in mind—he was also influenced by the fact that he had noticed a car approaching the crossing. Upon seeing the motorman start his car he immediately gave the more vigorous signal used to indicate to the locomotive engineer that an emergency had arisen requiring the instant stopping of the train. It matters little whether one accepts the evidence of the brakeman or not; for if he acted as he says he did, he appears to have done his duty, if he did not he was incurring a grave and quite unnecessary risk in not taking instant steps to stop the train upon perceiving that the motorman was about to cross the track. So also, as regards the locomotive engineer (if the signal was given), it is of no consequence whether he observed the signal or did not observe it, it was his duty to be on the alert for signals and instantly to obey a signal to stop.

With great respect, I think these considerations are not met by the reasoning of the learned trial judge or by that of the Court of Appeal.

The learned judges of the Court of Appeal appear to have considered that a dangerous situation requiring special precautions

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arose for the first time when, in consequence of the violent jerk forward of the electric company's car, Mrs. Bartlett was thrown to the ground. That, with respect, appears to be a misconception of the position. The approach by a train of this character towards a much-used street having on it a street car line in operation was in itself a situation involving risk, and this, as I have already said, is recognized in the instruction mentioned above. It was a situation requiring in itself exceptional precautions, as the instruction shows. Add to that the fact [365] that a street car was on the line approaching the point of intersection, and you have a not inconsiderable increase of risk; a situation imperatively demanding that the precaution prescribed by the instruction, namely, of coming to a stop, should not be omitted; and, as I have already said, a situation full of grave possibilities arose and became apparent when the street car was seen to move forward across the track.

Mr. Clark in his concise and able factum faces the difficulty thus:—

"The appellant's contention amounts to this, that when Cammell saw the street car start to move it should have occurred to him that some of the passengers might fall on the track in front of the train, and his duty to avoid the consequences of the appellant's neglect began then, and not when the last dangerous situation actually arose. Admitting that it was the natural thing for passengers in such a critical situation to rush to the front or rear of the car, no one would presume that when jumping they would select the diamond,—the only dangerous spot there was upon which to alight. But even assuming that the brakesman should have foreseen what actually took place, the appellants are not entitled to complain if Cammell, who was thrown into a state of excitement by their negligence, did not act in the most reasonable manner."

This extract from the respondent's factum puts very forcibly the point upon which the respondent company must rely in view of the findings of fact already referred to. These contentions are first open to the observation—although in the present state of the litigation the controversy has become one between the appellant

company and the respondent company—that the decision of that controversy must be dictated by the answer given to the question whether the plaintiff had or had not a cause of action against the respondent company. And it is perhaps needless to say that in passing upon that issue the conduct of the Electric Company's servants is not to be imputed to Mrs. Bartlett as her conduct; and further, the situation, if it was critical and embarrassing, was brought about, at least in part, by the failure to bring the train to a stop conformably to the practice.

[366] The substance of the contention is that the persons responsible for the train might reasonably in the exercise of their judgment assume, and act upon the assumption, that the car would clear the railway track before the train reached the point of intersection; and that in the circumstances there was no ground for apprehending that the passengers would leave or be thrown from the car and remain helpless on the track as the train approached them. The first observation to suggest itself is an important one. The onward motion of the train was not the result of the judgment of the brakeman that it was safe to proceed; on the contrary, he, as we have seen, took the opposite view. The second is virtually a repetition of what already has been said; namely, that once the electric car started forward the risk of the situation imperatively demanded that the train should be stopped. The fact that in the event the car did clear the track without injury is little to the purpose; failure of the mechanism might have brought it to a standstill before the track was passed. The duty of the respondent company was to take suitable measures to obviate the danger incurred by the passengers of the car, of injury from the respondent company's train arising out of the situation; and the fact that the particular manner in which the injury did occur was one not naturally to be anticipated is really of no importance. See *Hill v. New River Co.* (1868) 9 Best & S. 303, 18 L. T. N. S. 355; *Clark v. Chambers* (1878) L. R. 3 Q. B. Div. 327, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, 26 Week. Rep. 613, 19 Eng. Rul. Cas. 28.

The obligation to take care, default in respect of which constituted the negligence charged, was an obligation due to the passengers in the car; and, that being so, the respondent company is re-

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sponsible for harm suffered by them in consequence of its default [367] to the extent to which the damages are not, in the language of the law, too remote.

Are the damages too remote? Was the running down of Mrs. Bartlett in the circumstances a consequence for which in law the respondent company was responsible? The rule as regards remoteness of damage was recently discussed by the President of the Probate and Divorce Division in *H.M.S. London*, L. R. [1914] Prob. 72, 83 L. J. Prob. N. S. 74, 109 L. T. N. S. 960, 30 Times L. R. 196, 12 Asp. Mar. L. Cas. 405, and, with respect, I concur in the view there expressed that where the harm in question is the direct and immediate consequence of the negligent act then it is within the ambit of liability. Here the injury complained of was the direct and immediate consequence of the failure to stop the train.

Moreover, it is sufficient in this case to say that the railway company being under an obligation to take precautions to obviate the risk of harming the passengers in the electric car through the instrumentality of its train moving across the car track, and the wrongful neglect of this duty having resulted directly in the very harm it was the duty of the company to avoid, remoteness of damage is out of the question. *Clark v. Chambers, supra*.

Where there is a duty to take precautions to obviate a given risk, the wrongdoer who fails in this duty cannot avoid responsibility for the very consequences it was his duty to provide against by suggesting that the damages are too remote, because the particular manner in which those consequences came to pass was unusual, and not reasonably foreseeable.

One aspect of the case was the subject of a good deal of discussion, and I refer to it only to make it quite clear that I neither dissent from nor concur in the views expressed by the courts below with regard to it. [368] The point to which I refer is that which arises upon the contention of the Electric Company's counsel that § 264 of the "Railway Act" is applicable, and that the railway company should be held responsible for failure to observe the requirements of those sections with reference to braking appliances. I express no opinion upon the question whether this section applies to a train such as this.

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Anglin, J.: The liability of one or other or both the defendants to the plaintiff being admitted, the purpose of continuing this litigation is to determine where the responsibility rests, the defendants having agreed amongst themselves for contribution (on some basis with which we are not concerned) should both be held liable. The learned trial judge's view was that the appellant is solely answerable, and his judgment was unanimously affirmed on appeal. The evidence so conclusively establishes that its negligence was a cause of the death of the plaintiff's wife that so far as it seeks to be wholly discharged its appeal is quite hopeless. Assuming that due care by its codefendant would have enabled it to avoid running down the plaintiff's unfortunate wife, notwithstanding the peril in which she had been placed by the appellant's negligence, that fact could afford the latter no answer to the plaintiff's claim. *City of Toronto v. Lambert* (1916) 54 Can. S. C. 200, 33 D. L. R. 476, Ann. Cas. 1918D, 57; *Algoma Steel Corporation v. Dubé* (1916) 53 Can. S. C. 481, 31 D. L. R. 178.

Upon the other question—that of the joint liability of the respondent—there is much more to be said.

The learned trial judge could "find no particular in respect of which the Steam Railway Company were guilty of any negligence conducing to the accident," [369] and the Court of Appeal took the same view. I gather from his judgment that the learned trial judge was of the opinion that there was no evidence on which a jury could have found actionable negligence on the part of the employees of the Steam Railway Company, and in effect so directed himself; and from the reasons for judgment of the Court of Appeal, delivered by the learned Chief Justice of Manitoba, I infer that in his opinion, because, the electric tramcar having crossed in safety, the immediate peril to the deceased caused by her jumping or being thrown from that tramcar and falling on the diamond crossing in front of the approaching train was a situation which the steam railway employees could not reasonably have been expected to anticipate, and because when it actually arose it was possibly too late to stop the train and prevent the accident, or, at all events, the train crew had little, if any, opportunity to think and act, liability on the part of the Steam Rail-

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way Company could not be found. With profound respect, although the idea is not very clearly expressed, these views would seem to imply that the liability of the doer of a negligent act is restricted to consequences which he should have anticipated would flow from it as natural results.

"Where there is no direct evidence of negligence the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not . . . ; but when it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." *Smith v. London and South Western Ry. Co.* (1870) L. R. 6 C. P. 14, at page 21, 18 Eng. Rul. Cas. 726, per Channel, B.

"What the defendants might reasonably anticipate is, as my brother Channel has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence. *Ibid.*, per Blackburn, J."

[370] Mr. Beven in his work on Negligence (Can. ed. p. 85), introduces a discussion of this and other cases bearing on this aspect of the law of negligence by stating "a distinction of importance for understanding this branch of the law; between acts from which injurious consequences in the result flow to others, but which are not negligent in law, because these consequences would not antecedently have been anticipated to flow as natural results; and acts which carry liability because their probable outcome is injurious acts, though, in fact, the consequences which flow are not those anticipated.

"The doer of a negligent act, says the learned author, is responsible for the consequences flowing from it in fact, even though antecedently, to a reasonable man, the consequences that to flow seem neither natural nor probable." See, too, *Shearman and Redfield on Negligence* (6th ed.) §§ 26a, 29a, and 30.

The Canadian Northern train was moving very slowly—between 1 and 2 miles an hour. The evidence establishes that, equipped as it was, it could easily have been stopped in 40 feet. The engineer deposed that he believed he had in fact stopped it within 15 feet on receiving the first signal to do so. The evidence

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also establishes that when the electric tramcar started to move towards the crossing, thus creating a situation of danger, which, in my opinion, made it the duty of those in charge of the advancing steam railway train to stop it, or at least to get it under such control that it could be instantly stopped if the reckless conduct of the motorman in driving the electric tramcar onto the diamond crossing should give rise to a situation making that necessary—a duty which they owed to all the people on the tramcar—the train was at least 75 feet from the diamond crossing. The brakeman on the front car so tells us. He saw the tramcar start. Had he at once signaled the engineer to stop or even to prepare to stop before reaching the crossing, and had [371] the latter promptly obeyed the signal, no harm would have ensued. Still later, when the electric tramcar was approximately two thirds across the diamond and had almost stopped, as the brakeman informed us, the danger being thus greatly increased and the duty to stop all the more pressing, the train was still 50 feet from the crossing, and prompt action by the brakeman and engineer would have brought it to a stand at least 10 feet before it reached the crossing. That the appellant's train may have had the right of way over the electric tramcar affords no excuse for not fulfilling this duty. It would not justify the respondent running down the appellant's car if it could avoid doing so by reasonable care—still less killing the plaintiff's wife. Whatever the brakeman may have done to signal the engineer, the evidence indicates that no attempt to stop or even lessen the speed of the train, or to get it under better control, was made by the engineer until it was almost upon the crossing, since, when it was actually stopped, the foremost part of the front car was in fact 16 feet beyond the crossing. There was, in my opinion, abundant evidence on which a jury might have found negligence imputable to the Steam Railway Company either on the part of the brakeman or on that of the engineer.

Had the electric tramcar been run into on the crossing, as would have happened if the motorman had failed for any reason to get it clear, the liability of the Steam Railway Company for damages sustained in the collision, at all events by passengers on the tramcar, would seem to me to be incontrovertible. It was only by suddenly "speeding up" in response to the shouted warning

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of the brakeman, given when his train was only 30 feet from the crossing, that [372] the motorman succeeded in taking his car out of danger, possibly as a result precipitating the plaintiff's wife and two other persons on the crossing in front of the still advancing train then only 15 feet away. The actual danger which the brakeman should have anticipated, and apparently did in fact anticipate, *viz.*, collision with the tramcar, was thus obviated. But the negligence of the Canadian Northern employees, which was a cause of that peril having continued until the car escaped from the danger zone, did not thereupon cease to operate. It had a further and, under the circumstances, a natural consequence, in the sense explained in *Shearman & Redfield's work* (§§ 29a and 30), in the running over of the plaintiff's wife, and the Steam Railway Company, in my opinion, cannot escape liability merely because that particular consequence or the immediate situation in which it occurred cannot be said to have been something which was or should have been within the contemplation of the train crew when they negligently failed, while the tramcar was in a position of peril, either to stop their train or to have it under such control that it could at any moment have been stopped before reaching the crossing.

Considerations such as arise between a plaintiff and a defendant in cases of contributory negligence are quite foreign to the question now before us,—that of the liability of a defendant to a plaintiff against whom no contributory negligence is suggested.

In my opinion not only was there evidence of negligence on the part of the respondent, proper for submission to a jury, but on the uncontroverted facts a finding of such negligence should be made.

The negligence of both defendants conduced to the death of the plaintiff's wife. Had that of either [373] been absent, the lamentable tragedy would not have occurred.

It is our duty to give the judgment which the court appealed from should have given. Exercising the power conferred on the Court of Appeal by § 9 of R.S.M. [1913], chap. 43, I would set aside the judgment of the learned trial judge and direct the entry of judgment declaring both defendants liable to the plaintiff for the sum agreed on as damages, with costs. There should be no

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costs as between the defendants of the proceedings in the Court of King's Bench, but the appellant is entitled to be paid its costs here and in the Court of Appeal by the respondent.

Brodeur, J., dissenting: The question in this case is whether the Canadian Northern Company has been at fault in the accident which caused the death of Mrs. Bartlett. The evidence may lead to the conclusion that there was negligence on the part of the employees of the railway company in not stopping the train after the engineer in charge of the locomotive had received the proper signals. But the evidence is not very positive and is in some respects conflicting. In view of the unanimous findings of the courts below in that respect I would not feel disposed to interfere.

The appeal should be dismissed with costs.

Mignault, J. The whole question here is not whether the plaintiff, Bartlett, was entitled to recover damages for the death of his wife, for both the appellant and the respondent admitted that he was, but whether the plaintiff had a valid cause of action against the respondent as well as against the appellant.

In other words, would the plaintiff, on the evidence, be entitled to recover damages for the death of his wife against both defendants, or against one only of [374] them? The learned trial judge came to the conclusion that judgment should be entered in favor of the plaintiff against the defendant the Winnipeg Electric Railway Company, and that the action should be dismissed against the defendant the Canadian Northern Railway Company, with costs to be paid by the Winnipeg Electric Railway Company, to its codefendant, the Canadian Northern Railway Company.

The conduct of the trial to a certain extent obscured this simple issue; for, as the learned trial judge observed: "The whole course of the trial consisted of evidence and arguments adduced by each of the codefendants to show that the other should be held liable." And so before this court the argument was directed to show that one company rather than the other should bear the burden of the admitted liability towards the plaintiff, with the result that the one emphasized the negligence of the other, especially the respondent the negligence of the ap-
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pellant, while the latter, which could not deny that its motorman had been grossly in fault, endeavored to show that, but for the negligence of the respondent, this fault would not have caused the accident.

I propose to look at the case solely on the basis of the real question which was in issue, that is to say, on the evidence, would a jury, or a judge sitting without a jury, have been justified in finding against both defendants negligence entitling the plaintiff to recover against both of them, or would a verdict or a judgment be justified only against the appellant, so that the respondent would have been entitled to have the plaintiff's action dismissed, as it was, in so far as it was concerned?

And on this basis, and in answer to the question so submitted by the agreement of the parties, I have [375] come to the firm conclusion, with deference, that the plaintiff was entitled to recover damages against both defendants as being jointly liable for the accident.

The plaintiff's wife was a passenger on an electric car of the appellant, which had to cross the line of the respondent on the level on Portage avenue, Winnipeg. At that time a freight train of the respondent was approaching the crossing very slowly, its speed being about 2 miles per hour. It consisted of four box cars in front, then an engine and some twelve empty cars. A brakeman, named Kenneth Cammell, was on the front car. The electric car, as the rules required, stopped within a few feet of the railway track, and the conductor got off and went ahead to see if the track was clear, and it was the duty of the motorman to wait until the conductor gave the signal to go ahead, which signal he never gave. What happened then is best described in the language of the learned trial judge:—

“When the freight train was within perhaps 75 feet of the crossing the motorman of the electric car suddenly decided to get across in front of the freight train and started forwards. When the electric car was partly on the diamond the brakeman on the freight car saw imminent danger of collision, and, as the car seemed to be stopping, shouted to the motorman to ‘go ahead.’ The motorman thereupon apparently applied extra power, the car went ahead with a jerk, and three passengers, including the
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deceased, were either thrown off the rear platform of the car or else in desperation jumped from it, and alighted on the diamond where the deceased was run over."

During all the time the brakeman had the electric car in full view, and when it suddenly started to go ahead, the train should have been stopped. The time card of the respondent required the train to stop 100 feet from the crossing, and Cammell says that he gave at that distance the usual stop signal, but it was not obeyed. He was, he adds, about 50 feet from the diamond, or crossing of the railway and electric [376] car tracks, when the motorman ran his car ahead so that it came right on the diamond, where it seemed to stop, and the brakeman gave several violent stop signals which the engine driver either did not see or failed to obey, and the brakeman shouted to the car to go ahead, which it did with a kind of jerk and cleared the diamond, but at its sudden jerk forward, the plaintiff's wife who, with two other passengers, had run to the rear platform of the car, was either thrown off or jumped off, and fell onto the diamond, where she was run over.

There can be no doubt as to the gross negligence, not to use a much stronger term, of the motorman when he started forward with a moving train coming towards him so close to the crossing. But this does not mean that the railway company was itself free from negligence so that the plaintiff would not have a right of action against it also. The learned trial judge stated that he could find no particular in respect to which the Steam Railway Company was guilty of any negligence conducive to the accident. With deference, I think it was negligence not to have stopped the train, which could have been done, when the electric car first started forward in an attempt to clear the track. If the railway train was then "within perhaps 75 feet" of the crossing, as found by the learned trial judge, or even about 50 feet away, as testified by Cammell, the train, which he says was just crawling, could have been stopped short of the crossing had the stop signals been obeyed.

In view of these circumstances I cannot think for an instant that if the plaintiff had sued the respondent alone he would not have been entitled to a verdict or judgment, and surely the
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respondent could not have escaped liability by emphasizing—as it does here—[377] the gross negligence of the Winnipeg Electric Railway Company.

The learned Chief Justice of Manitoba made use of an argument which at first impressed me when it was urged at the hearing by counsel for the respondent. He said: "The accident was a natural sequence of the negligent conduct of the motor-man. See *Prescott v. Connell* (1893) 22 Can. S. C. 147. The brakeman on the front of the train had urgently signaled the engine driver to stop and had repeated his signals. There was not sufficient time to do anything further after the deceased fell on the track. The train was stopped as soon as possible. The trainmen were suddenly faced with a new situation of danger, which gave them little, if any, time to think and act. Even if they could have done anything more than was done to avoid the accident, the court ought not to require of them, in the new situation that was created, perfect nerve and presence of mind enabling them to do the best thing possible."

And it was urged that the respondent could not have foreseen that passengers in the electric car would jump out or be thrown out of the car.

With great deference and upon full consideration I am of the opinion that this argument cannot prevail. Before "a new situation of danger was created," there was a situation of danger created by the attempt of the electric car to cross before the train reached the crossing, and as the learned Chief Justice observed, the brakeman had urgently signaled the engine driver to stop and had repeated his signals.

There was then time for the train crew, and especially the engine driver, if he was heeding the signals, to think and to act. Wooden, the engine driver, was examined before the Public Utilities Commissioner, and stated that he could have stopped his engine within 15 feet, and he did not contradict this statement when he was cross-examined at the trial. And as to the argument that it could not have [378] been foreseen that passengers would jump out of the car in the dangerous situation created by the joint negligence of the two companies, the learned Chief Justice rightly observes that the passengers did what might have

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been expected in such a case, and rushed to the door and tried to leave the car.

On the whole I am of the opinion, with deference, that the judgment which absolved the respondent of any negligence conducive to the accident cannot stand, and that it should be declared that the plaintiff is entitled to recover against both defendants as being jointly liable for the accident.

The appeal should therefore be allowed with costs here and in the Court of Appeal, and the two defendants condemned to pay the plaintiff the amount agreed upon. There should be no costs of the trial as between the defendants.

Appeal allowed, with costs.

Solicitors for the appellant: *Moran, Anderson, & Guy.*

Solicitors for the respondent: *Clark & Jackson.*

Note.—Liability of railroad for injury to one in jumping or falling from car or vehicle to avoid threatened collision at crossing.

The question under consideration is an interesting one and one on which there appears to be little authority.

In the reported case (*WINNIPEG ELECTRIC R. CO. v. CANADIAN NORTHERN R. CO. ante*, 454), where an electric car upon which the deceased was a passenger attempted to pass over a crossing ahead of a work train which was also approaching the crossing in close proximity, and either the brakeman failed to give or the engineer did not obey signals to stop, so that, although by a sudden increase of the speed of the electric car it crossed in safety, one of the passengers was thrown, or jumped, onto the track and was killed by the train, it was held that the railroad company was liable, the view being taken that it could not escape liability merely because the particular consequence, or the immediate situation in which the accident occurred, could not have been foreseen by its employees, and that liability for its employees' acts continued to passengers on the electric car who were thrown therefrom, even after the car had passed to a place of safety.

In *Fahy v. Director General* (1920) 235 Mass. 510, 126 N. E. 784, where the plaintiff was injured by jumping from the rear seat of an automobile, in which he was riding as a guest, there was evidence that the automobile was stopped 500 feet from a railroad crossing; that the driver as he started told the plaintiff that they

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were approaching a crossing and to listen for a bell or whistle; that bushes obscured the view to within 27 feet of the farthest track; that when that distance away, and when the automobile was going at the rate of 15 miles an hour, the driver and the plaintiff saw a train approaching about 125 feet away; that the driver started the automobile forward and crossed in safety, and that the plaintiff jumped and sustained an injury to his foot,—and testified that although listening for a bell or whistle he heard none. It was held, the jury having found that the statutory signal was not given, that the evidence warranted a finding that by reason of the failure to give such signal the plaintiff was placed in a position of great danger but a short distance from a rapidly moving train, and that this neglect contributed to his injury. It was further held in this case that it could not be said as a matter of law that the plaintiff was not in the exercise of due care. With respect to this the court said: "It was plainly a question for the jury, whether the plaintiff's conduct in remaining in the automobile until he saw the train was that of a prudent man; they might say that up to this time he did all that could be expected of a person of ordinary care and caution. If, as soon as the plaintiff saw the danger, without time for reflection, realizing that the train was within a few feet of him, and that a collision was almost inevitable, he jumped from the automobile, thinking it best for his safety, and if the jury found that such conduct was reasonable in view of all the circumstances, they could decide he was using proper care, and it could not be ruled as matter of law that he was careless."

And in *St. Louis, I. M. & S. R. Co. v. Eichelman* (1915) 118 Ark. 36, 175 S. W. 388, where there was evidence that the plaintiff's horse was frightened by the noise and steam from an engine at a crossing and started to run away, and that the plaintiff became frightened and jumped from the wagon, it was held the question whether the plaintiff had been guilty of contributory negligence in jumping was, upon the evidence, for the jury.

In *Turner v. St. Louis-San Francisco R. Co.* (1920) 106 Kan. 591, 189 Pac. 376, which was an action by the parents of a child killed by being thrown from a vehicle driven by her mother, it was held that, assuming that the child's fall from the wagon was caused by the roughness of the crossing, yet there could be no recovery, as the mother might, upon having seen a train approaching, have stopped, and that her act in speeding up to cross ahead of the train was negligence which contributed to the accident, and barred a recovery by her.

In *Parker v. Seaboard Air Line R. Co.* (1921) — N. C. —, 106 S. E. 755, it was held that an occupant of an automobile who, while at-
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tempting to escape therefrom because of an imminent collision with a train which was backing toward the highway crossing, was struck and much more severely injured than the other occupants, was properly found not to have been guilty of contributory negligence, the case being one of a sudden peril or emergency,—especially as the flagman on duty cried out, “Jump! jump! jump!”

A recovery was allowed in *Ft. Smith & W. R. Co. v. Hutchinson* (1918) — Okla. —, 175 Pac. 922, for an injury resulting from the plaintiff's jumping from a wagon at a crossing to avoid a collision due to the defendant railroad's negligence; the question there considered, however, was whether the jury were warranted in finding that the particular injury complained of resulted from the jump.

J. T. W.

[ENGLISH DIVISIONAL COURT.]

HARTELL v. BLACKLER.

[1920] 2 K. B. 161.

Also Reported in 123 L. T. N. S. 171, [1920] W. N. 95.

Landlord and tenant — Tenancy determined by notice to quit — Tenant holding over — Tender of rent by tenant — Acceptance by landlord otherwise than as rent — Waiver of notice.

The acceptance and retention of money sent by a tenant in payment of rent accruing after the expiry of a notice to quit which had been served on him constitute a waiver of the notice to quit and a recognition of a continuance of the tenancy, although the lessor's solicitors in answer to the tenant's letter wrote him that he was not recognized as tenant, and that the money was retained on account of use and occupation, and not as rent.

(February 13, 1920.)

APPEAL from the Torquay County Court.

In April, 1919, Mrs. Barchard was tenant to Mrs. L. F. Wood of a house and premises at Torquay known as Les Hirondelles, the tenancy being due to expire on June 1. The premises included a lodge which Mrs. Barchard had sublet on a weekly tenancy at a rent of 4s. a week to the defendant Blackler, who had formerly been a gardener in her employment. On April 8 Mrs. Wood contracted with the plaintiff, Mrs. Hartell, for the sale to
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her of Les Hirondelles with vacant possession on June 1. In order to assist in carrying out that contract Mrs. Barchard gave the defendant on May 12 notice to give up possession of the lodge on May 21. The plaintiff went into possession of the principal house early in June, but was unable to get possession of the lodge, as the defendant refused to quit. The defendant on several occasions subsequent to May 21, when the notice to quit expired, tendered rent for the lodge to the plaintiff, but she always declined to accept it. On July 29 the defendant wrote to the plaintiff a letter saying, "I inclose 8s. rent which was refused." The plaintiff forwarded that letter to her solicitors, Messrs. Elliot, Square, & Geake, who replied to the defendant as follows: "Mrs. Hartell has sent us your registered letter dated July 29 in which you inclose P. O. [162] for 8s. for rent 'which was refused,'—Mrs. Hartell does not recognize you as her tenant, and we will retain the P. O. for the time on account of use and occupation of her premises, but not as rent. Mrs. Hartell requires the lodge for the occupation of her own servants, and you must give up possession at the earliest possible moment." In November, 1919, the plaintiff brought this action in the county court to recover possession of the lodge, alleging that she required it for a gardener in her employ, and that the defendant was a cause of nuisance and annoyance to her. The defendant relied on the Increase of Rent and Mortgage Interest (War Restrictions) Acts 1915 and 1919.

The county court judge held that the acceptance and retention of the 8s. amounted to a recognition of the defendant's tenancy and a waiver of the notice, notwithstanding that the plaintiff's solicitors, in terms, refused to treat the payment as one of rent and repudiated the existence of any tenancy. He accordingly gave judgment for the defendant. The plaintiff appealed.

Harold Murphy, for the appellant. In order that the acceptance of rent accrued, due, after the expiry of a notice to quit, may operate as a waiver of the notice, the money must not only be paid as rent, it must also be accepted as rent. In *Doe ex dem. Cheny v. Batten* (1775) Cowp. pt. 1, p. 243, 98 Eng. Reprint, 1066, 9 East, 314, note, 103 Eng. Reprint, 593, note, 9 Revised Rep. 570, note, Lord Mansfield and the full Court of King's Bench held
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that the mere acceptance of rent by a landlord for occupation subsequent to the expiry of a notice to quit is not of itself a waiver of the notice, but matter of evidence for the jury. The question is "*quo animo* it was received." In *Goodright ex dem. Charter v. Cordwint* (1795) 6 T. R. 219, 101 Eng. Reprint, 520, 3 Revised Rep. 161, Lord Kenyon said that if the money "*were paid eo nomine as rent and received as such*" the receipt was a waiver of the notice, but not otherwise, and the other judges concurred. There the trial judge had left the question to the jury, who found that the money had been so received. In *Woodfall's Landlord and Tenant*, in the chapter dealing with waiver of forfeiture, it is said that "demand of rent accruing due [163] after the forfeiture" amounts to a waiver "if the demand be absolute and unqualified."

If this view is right,—namely, that it is, as Lord Mansfield said, a question of fact in each case whether the landlord by accepting the money intended to create a new tenancy,—it is perfectly clear that in the present case the plaintiff's solicitors did not intend to do so; they expressly negatived such intention. But in *Croft v. Lumley* (1855) 5 El. & Bl. 648, 680, 119 Eng. Reprint, 622, 25 L. J. Q. B. N. S. 223, 2 Jur. N. S. 275, 4 Week. Rep. 375, it was treated not as a question of fact, but as one of law. There the lessor of the Covent Garden Opera House claimed that the lease had been forfeited for breach of covenant. The lessor, subsequently to the alleged breach, accepted rent from the lessee, but accepted it as compensation for occupation only and not as rent. Lord Campbell and the Court of Queen's Bench held as matter of law that, notwithstanding that qualification, the acceptance of the rent operated as a waiver of the forfeiture, upon the ground that "when money is paid, it is to be applied according to the expressed will of the payer and not of the receiver." On appeal to the Exchequer Chamber it became unnecessary to decide the point, as the judges were of opinion that there had been no forfeiture. The case was then carried to the House of Lords (1858) 6 H. L. Cas. 672, 10 Eng. Reprint, 1459, 27 L. J. Q. B. N. S. 321, 4 Jur. N. S. 903, 6 Week. Rep. 523, and the judges were consulted. Eight of them were for affirming the Queen's Bench, holding that there had been a waiver. They were
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of opinion that the lessor had no right to take the money at all unless he took it as rent. The ninth, Crompton, J., dissented. He held that the rule *solvitur in modo solventis* did not apply to such a case; that the question turned on the landlord's election, and that the landlord could not be held to have elected to treat the tenancy as continuing when he expressly said that he would not. As the two Law Lords who heard the appeal, Lords Cranworth and Wensleydale, came to the conclusion that there had been no breach of covenant and therefore no forfeiture, the question of waiver did not call for decision. Lord Cranworth said he expressed no opinion upon it. But Lord Wensleydale said he was inclined to agree with Crompton, J., [164] as to the inapplicability of the rule of *solvitur in modo solventis*. He was of opinion that the question of waiver was one of fact. It is to be observed that that was a case of forfeiture, not of notice to quit, and it may be that on that ground a distinction is to be drawn between *Croft v. Lumley* (1855) 5 El. & Bl. 648, 680, 119 Eng. Reprint, 622, 25 L. J. Q. B. N. S. 223, 2 Jur. N. S. 275, 4 Week. Rep. 375, and such a case as the present, for stronger evidence would be required of an intention to create a new tenancy than of a waiver of a forfeiture, a forfeiture being a thing against which the courts have always leaned. But if no distinction can be drawn between the two cases, it is submitted that the opinions of Lord Mansfield, Lord Wensleydale, and Crompton, J., are to be preferred to those of the other judges in *Croft v. Lumley*. The question was again discussed in *Davenport v. The Queen* (1877) L. R. 3 App. Cas. 115, 47 L. J. P. C. N. S. 8, 37 L. T. N. S. 727. There a lease of Crown lands in Queensland had been granted to the appellant subject to certain conditions which he failed to perform, and the lease thereupon became liable to forfeiture. Subsequently to the appellant's breach of covenant the government accepted rent from him for several successive years with full knowledge of the breach, but after notification in the Gazette that it would be received conditionally and without prejudice to the government's rights. The evidence was that the government of the colony wanted the money and could not afford to insist on the forfeiture. The Privy Council found as a fact that the money was not only paid but received as rent, and under those circumstances

they held that a mere protest that it was received conditionally would not prevent such receipt from operating as a waiver of the forfeiture. It is true that they went on to say that a direction to the jury by trial judge "that the intention of the party receiving the rent and not of the party paying it, must be looked at in considering the question of waiver," was erroneous. But that was merely *obiter dictum*; it was unnecessary to the decision.

No counsel appeared for the respondent.

Bailhache, J.: This case, which comes before us on appeal [165] from the Torquay County Court, raises a point of considerable difficulty, on which there has been great difference of judicial opinion, and for that reason I regret that no counsel appeared to argue it on behalf of the respondent. It appears that the plaintiff purchased certain property, including a lodge. At the date of completion of the purchase the defendant, who had previously been tenant of the lodge, but whose tenancy had been determined by notice to quit, was still in occupation of it and refused to give up possession. The plaintiff wanted the lodge for her gardener and brought this action for the recovery of possession. The defendant set up a defense under the Increase of Rent and Mortgage Interest (War Restrictions) Acts that he was unable to get suitable accommodation elsewhere, but that defense was not dealt with in the county court; as the judge came to the conclusion that the notice to quit had been waived and that the defendant's tenancy had not been determined. The question is whether the judge was right. The facts of the case are to be found in a letter written by the plaintiff's solicitors to the defendant. The defendant had sent two weeks' rent to the plaintiff. She refused to accept it, and sent it on to her solicitors, who then wrote the letter in question. [His Lordship read the letter.] I may here observe that the defendant appears to have taken advice on the matter, and to have been told that if he could get the rent accepted the notice to quit would be of no avail. The plaintiff's solicitors also were perfectly aware of the point which the defendant would probably raise when they wrote their letter. The county court judge said that, in his opinion, "the acceptance and retention of the rent paid, although accompanied by such protest,

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was an acknowledgment of a tenancy and a waiver of any notice." The plaintiff has appealed, and Mr. Murphy, on her behalf, contends that before acceptance of rent can operate as a waiver of a notice to quit, it must not only be paid *eo nomine* as rent, but also received as such; and that if the landlord at the time of the receipt is careful to say that he received it as something else, it is no waiver. It may be that there is some support for that proposition [166] to be found in the textbooks, but after examining the authorities cited I have come to the conclusion that it is unsound. The clearest statement of the law on this point is, I think, to be found in the opinion of Williams, J., one of the judges consulted by the House of Lords in *Croft v. Lumley* (1858) 6 H. L. Cas. 672, 725, 10 Eng. Reprint, 1459. "It was established," he said, "as early as *Pennant's Case* (1596) 3 Coke, 64a, 76 Eng. Reprint, 775, that if a lessor after notice of a forfeiture of the lease accepts rent which accrued after, this is an act which amounts to an affirmance of the lease and a dispensation of the forfeiture. In the present case the facts, I think, amount to this, that the lessor accepted the rent, but accompanied the acceptance with a protest that he did not accept it as rent, and did not intend to waive any forfeiture. But I am of opinion that this protest was altogether inoperative. As he had no right at all to take the money unless he took it as rent, he cannot, I think, be allowed to say that he wrongfully took it on some other account. And if he took it as rent, the legal consequences of such an act must follow, however much he might desire to repudiate them." Now that view might at first sight appear to be opposed to the cases which establish that where a debtor, admitting that a debt of a smaller amount than that claimed is due, sends his creditor a cheque as a payment in full of all demands, the creditor is not precluded, by keeping it as a payment on account, from afterwards suing for the balance of his claim. See *Day v. McLea* (1889) L. R. 22 Q. B. Div. 610, 58 L. J. Q. B. N. S. 293, 60 L. T. N. S. 947, 37 Week. Rep. 483, 53 J. P. 532. But the answer is this: In the case of the creditor accepting as a payment on account money which is offered as payment in full of a partly admitted liability, it is common ground between the parties that at least the amount tendered is due, and the only question is whether the creditor is

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entitled to more. Therefore, the creditor in taking it is doing a perfectly lawful act. Whereas in the case of landlord and tenant, as Williams, J., points out, where money is paid as rent, the landlord does an unlawful act if he accepts and retains it in discharge of a debt of a different character, such as compensation for use and [167] occupation, and a man is not to be heard to set up his own wrong. That seems to me to be the distinction between the two classes of cases. In *Croft v. Lumley* (1855) 5 El. & Bl. 648, 680, 119 Eng. Reprint, 622, the lessor's agent accepted rent accrued due after an alleged forfeiture, but insisted that he received the money as compensation for occupation only, and not as rent, and that he reserved the lessor's right of re-entry. The case came first before the Court of Queen's Bench, which held that the acceptance of the rent was under the circumstances a waiver of the forfeiture. Lord Campbell, who delivered the judgment of the court, said: "There is an established maxim of law that, where money is paid, it is to be applied according to the expressed will of the payer, not of the receiver. If the party to whom the money is offered does not agree to apply it according to the expressed will of the party offering it, he must refuse it, and stand upon the rights which the law gives him. We see no reason why this maxim should not be applied to the transaction in question." There the lessor did everything he could to preserve his rights, but without avail. That case subsequently went to the House of Lords. What took place there is thus summarized in the notes to *Dumpor's Case* (1601) 4 Coke, 119b, 76 Eng. Reprint, 1110, in 1 Smith, Lead Cas. 12th ed. at p. 43: "The question of waiver was submitted, with others, to the judges, and eight out of nine were of opinion that, if there had been a forfeiture, it had been waived by the receipt of the money which had been offered as rent and as rent only. Of the two peers who decided the case, Lord Cranworth gave no opinion on the question of waiver, but Lord Wensleydale said he thought it was a question of fact, and not of law, whether the transaction amounted to a payment and receipt of rent, and that he was led to suppose that it did not, as the money was not demanded back when the lessor declared that he would only take it as compensation. His Lordship appeared to be of opinion that the rule *solvitur in modo*
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solventis is only applicable to the case of a payment in respect of one of two debts." This question of waiver was again [168] raised in *Davenport v. The Queen* (1877) L. R. 3 App. Cas. 131, 47 L. J. P. C. N. S. 8, 37 L. T. N. S. 727. There a lessee of Crown lands committed a breach of covenant which rendered the lease voidable. The government with notice of the breach accepted rent which had accrued due after breach, but accompanied their acceptance with a notification that they accepted it without prejudice to their right to insist on a forfeiture. The Privy Council, who found as a fact that the money was not only paid as rent, but received as rent, held that under those circumstances the lessor's protest that the acceptance was only conditional was unavailing. They cited the above-quoted passage from the opinion of Williams, J., in *Croft v. Lumley* (1858) 6 H. L. Cas. at p. 725, 10 Eng. Reprint, 725, 27 L. J. Q. B. N. S. 321, 4 Jur. N. S. 903, 6 Week. Rep. 523, but said that they did not find it necessary to invoke that opinion to its full extent, presumably because of their finding of fact that the rent in the case before them had been received as rent. In this state of the authorities I come to the conclusion that if a tenant tenders money as rent accrued due after the expiry of a notice to quit it is not safe for the lessor to receive it if he wants to rely on the notice, even though at the time of the receipt he expressly says that he receives the money, not as rent, but in some other character. Mr. Murphy attempted to draw a distinction between the case of a forfeiture and that of determination of a tenancy by notice to quit, but I am unable to see that there is any difference in principle between them. In both cases the question is, Has the landlord admitted that the tenant remains in occupation as tenant? I think that in this case the judgment of the county court judge was right and that the appeal must be dismissed.

Sankey, J.: I agree. I also regret that no counsel appeared to argue the case on the other side, though we have had the advantage of having all the authorities brought to our notice by Mr. Murphy, including those against him as well as those in his favor. This question of waiver by acceptance of rent is one which has agitated the profession for very many years, and it cannot at the

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present date be said to be definitely [169] decided. But having regard to the fact that in *Croft v. Lumley* (1858) 6 H. L. Cas. 672, where the facts were identical with those in the present case, eight out of the nine judges who were consulted by the House of Lords were of opinion that acceptance of rent under the circumstances was a waiver of the forfeiture, notwithstanding that the lessor expressly stated, as did the plaintiff's solicitors here, that he accepted the money as compensation for use and occupation, and not as rent, and that he refused to recognize the party paying it as his tenant, I think we ought to follow that opinion and hold that the notice to quit has been waived in the present case.

Appeal dismissed.

Solicitors for the appellant: *Law & Worssam, for Elliot, Square, & Geake, Plymouth.*

Note.—Acceptance of rent as waiver of cause of forfeiture or notice to quit.

I. Waiver of cause of forfeiture:

- a. By acceptance of rent accruing before cause for forfeiture, 487.
- b. By acceptance of rent accruing after cause for forfeiture, 488.
- c. Acceptance after action, or pending appeal, 495.
- d. Requirement of knowledge of breach, 497.

II. Waiver of breach of continuing covenants:

- a. Generally, 498.
- b. Covenants to carry on certain business, or work premises in specified way, 500.
- c. Covenants not to use in certain way, 500.
- d. Covenants to repair, 501.
- e. Covenants to keep premises free or unobstructed, 502.
- f. Covenants to insure, pay taxes, or rent, 503.
- g. Covenants against subletting or assigning, 506.
- h. Covenant to give security, 506.

III. Waiver of notice to quit, 506.

IV. Effect of intention, or attempt to qualify acceptance, 508.

This note does not cover the question of waiver or estoppel by a custom of receiving rents after they have become due, neither does it
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include the question whether a waiver results from payments by persons other than the lessee.

I. Waiver of cause of forfeiture.

a. By acceptance of rent accruing before cause for forfeiture.

It is generally held that the acceptance of rent after a cause for forfeiture has accrued does not operate as a waiver of the right to enforce the forfeiture where the rent received accrued before the cause for forfeiture arose. *Del Toro v. Juncos Central Co.* (1921; C. C. A.) 276 Fed. 894 (acceptance of rent becoming due and payable prior to lessee's failure to pay same within stipulated time after it should become due); *Silva v. Campbell* (1890) 84 Cal. 420, 24 Pac. 316 (acceptance of rent in arrears with notice of termination of lease as provided by its terms); *Morrison v. Smith* (1899) 90 Md. 76, 44 Atl. 1031 (default in payment of rent); *Mansur v. Chamberlin* (1911) 162 Mo. App. 155, 144 S. W. 510 (nonpayment of rent); *O'Connor v. Timmermann* (1909) 85 Neb. 422, 24 L.R.A. (N.S.) 1063, 133 Am. St. Rep. 668, 123 N. W. 443 (nonpayment of rent); *Jackson ex dem. Blanchard v. Allen* (1824) 3 Cow. 220 (obstructing premises); *Hunter v. Osterhoudt* (1851) 11 Barb. 33 (nonpayment of rent); *Campbell v. McElevey* (1859) 2 Disney (Ohio) 574 (nonpayment of rent); *Green's Case* (1852) Cro. Eliz. pt. 1, p. 3, 78 Eng. Reprint, 269 (nonpayment of rent); *Ward v. Day* (1863) 4 Best & S. 337, 122 Eng. Reprint, 486, 33 L. J. Q. B. N. S. 254, 10 L. T. N. S. 578, 12 Week. Rep. 829 (arrears in rent); *Re Bagshaw* (1918) 42 Ont. L. Rep. 466, 42 D. L. R. 596 (default in rent); *Dobson v. Sootheran* (1888) 15 Ont. Rep. 16 (breach by assignment); *Denison v. Maitland* (1891) 22 Ont. Rep. 166 (nonpayment of rent).

This is so although the cause of forfeiture is the failure promptly to pay the instalment of rent accepted. *Del Toro v. Juncos Central Co.* (1921; C. C. A.) 276 Fed. 894.

And in *Pendill v. Union Min. Co.* (1887) 64 Mich. 172, 31 N. W. 100, it was held that the mere receipt of rent due before a cause of forfeiture accrued would not waive the right of forfeiture; at least, unless the rent was fully paid.

And in the abstract of the decision in *Johnson v. Feilchenfeld* (1915) 191 Ill. App. 168, it was laid down that the payment, after forfeiture of a lease, of rent accruing before forfeiture, did not affect the forfeiture, in the absence of any facts connected with the payment tending to show a waiver of such forfeiture.

The acceptance of rent payable in advance after serving a notice of forfeiture for its nonpayment constitutes an affirmation of the
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lawful possession of the tenant, and so operates as a waiver of the forfeiture. *Bernstein v. Weinstein* (1920) 220 Ill. App. 292.

The authorities are not, however, in entire harmony with respect to the question under consideration.

Thus, in *Coon v. Brickett* (1918) 2 N. H. 163, it was held that a voluntary receipt of rent in arrear after a mere formal entry was a receipt of that for which the entry was made, and was an assent to the abandonment of the entry, and a waiver of the cause for forfeiture.

And in *Wood v. Long* (1876) 33 Phila. Leg. Int. 410, it was held that, after issuing a warrant for rent accrued, and collecting and receiving it, there could be no forfeiture for the nonpayment of the rent.

And it has been held in Indiana that the acceptance of rent due waives a right to forfeit for any existing default in the payment of rent. *Bacon v. Western Furniture Co.* (1876) 53 Ind. 229; *Templer v. Muncie Lodge* (1912) 50 Ind. App. 324, 97 N. E. 546; *Merrell v. Garver* (1913) 54 Ind. App. 514, 101 N. E. 152.

And it has been held that where a landlord, after the appointment of a receiver of the lease, receives rent due for certain months, he thereby waives his right to forfeit the lease for the nonpayment of other instalments of rent due for months prior to those for which the rent was received. *Blank v. Independent Ice Co.* (1911) 153 Iowa, 241, 43 L.R.A.(N.S.) 115, 133 N. W. 344.

It is well settled that the receipt of rent which has accrued does not waive the right to declare a forfeiture because of future defaults. *Robbins v. Conway* (1900) 92 Ill. App. 173 (nonpayment of rent); *Templer v. Muncie Lodge* (1912) 50 Ind. App. 324, 97 N. E. 546 (default in payment of rent); *Zotalis v. Cannellos* (1917) 138 Minn. 179, L.R.A.1918A, 1066, 164 N. W. 807 (breach of covenant as to subleasing).

And in *Carraher v. Bell* (1893) 7 Wash. 81, 34 Pac. 469, it was held that the collection of rents after service of notices to pay or vacate did not waive the right to forfeit the lease for a failure to pay the subsequent instalments, where the amounts collected were applied on prior instalments.

b. By acceptance of rent accruing after cause for forfeiture.

The rule is well established that the landlord's acceptance of rent accruing after a cause for forfeiture has occurred, with knowledge thereof, operates as a waiver of the right to declare a forfeiture on account of the breach.

UNITED STATES.—*Re Montello Brick Works* (1908) 163 Fed. 624, affirmed on other grounds in (1909) 93 C. C. A. 118, 167 Fed. 482.
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(nonpayment of rent); *Coy v. Title Guarantee & T. Co.* (1912) 198 Fed. 275 (assignment without lessor's written consent); *Durand v. Howard* (1914) L.R.A.1915B, 998, 132 C. C. A. 589, 216 Fed. 585 (nonpayment of rent); *Semidey v. Central Aguirre* (1915) 7 Porto Rico Fed. Rep. 572 (unauthorized lease); *Del Toro v. Juncos Central Co.* (1921; C. C. A.) 276 Fed. 894 (obiter).

ALABAMA.—*Dahm v. Barlow* (1890) 93 Ala. 120, 9 So. 598 (breach by carrying on trade contrary to lease); *Brooks v. Rogers* (1892) 99 Ala. 433, 12 So. 61 (breach by cutting and destroying timber); *Bowling v. Crook* (1893) 104 Ala. 130, 16 So. 131 (failure to cultivate according to progressive methods and to repair); *Attalla Min. & Mfg. Co. v. Winchester* (1893) 102 Ala. 184, 14 So. 565 (breach of conditions with respect to operating mine).

ARKANSAS.—*Clement v. Morris* (1918) — Ark. —, 203 S. W. 1011 (right to forfeit for nonpayment of rent waived by receipt of rent and occupancy following year); *Salley v. Michael* (1921) — Ark. —, 235 S. W. 785 (change in use of premises).

CALIFORNIA.—*McGlynn v. Moore* (1864) 25 Cal. 394 (failure to erect a building according to covenants in lease); *Randol v. Tatum* (1893) 98 Cal. 390, 33 Pac. 433 (breach by assigning); *Jones v. Della Maria* (1920) — Cal. App. —, 191 Pac. 943 (breach of covenant to give security); *Goodwin v. Grosse* (1922) — Cal. App. —, 206 Pac. 138 (breach by subletting).

CONNECTICUT.—*Camp v. Scott* (1879) 47 Conn. 366 (breach for nonpayment of rent); *Hartford Wheel Club v. Travelers Ins. Co.* (1905) 78 Conn. 355, 62 Atl. 207 (nonpayment of rent).

GEORGIA.—*Guptill v. Macon Stone Supply Co.* (1913) 140 Ga. 696, 79 S. E. 854, Ann. Cas. 1915A, 1249 (waiver of right to declare forfeiture for nonpayment of rent).

ILLINOIS.—*Watson v. Fletcher* (1869) 49 Ill. 498 (forfeiture for nonpayment of taxes); *Webster v. Nichols* (1882) 104 Ill. 160 (breach of covenant against assignment); *Stromberg v. Western Teleph. Constr. Co.* (1899) 86 Ill. App. 270 (nonpayment of rent); *Krygsman v. Stamatakis* (1912) 175 Ill. App. 583 (breach of covenant not to sublease); *Bernstein v. Weinstein* (1920) 220 Ill. App. 292 (nonpayment of rent payable in advance).

MICHIGAN.—*Patterson v. Carrel* (1912) 171 Mich. 296, 137 N. W. 158 (breach of covenant against subletting).

MINNESOTA.—*Thomas Peebles & Co. v. Sherman* (1921) 148 Minn. 282, 181 N. W. 715.

MISSOURI.—*Garnhart v. Finney* (1867) 40 Mo. 449, 93 Am. Dec. 303 (breach by assignment); *Trauerman v. Lippincott* (1889) 39 Mo. App. 478 (breach of provision against assignment); *Mansur v. Chamberlin* (1912) 162 Mo. App. 155, 144 S. W. 510 (nonpayment of rent).

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NEBRASKA.—*Stover v. Hazelbaker* (1894) 42 Neb. 393, 60 N. W. 597 (nonpayment).

NEW HAMPSHIRE.—*Buber v. Blais* (1920) 79 N. H. 516, 112 Atl. 396 (nonpayment of rent).

NEW JERSEY.—*Levy v. Blackmore* (1907) — N. J. Eq. —, 67 Atl. 1022 (breach of covenant as to business conducted); *Commercial Trust Co. v. L. Wertheim Coal & Coke Co.* (1917) 88 N. J. Eq. 143, 102 Atl. 448 (breach of covenant to pay taxes).

NEW YORK.—*Stuyvesant v. Davis* (1842) 9 Paige, 427 (nonpayment of rent); *Camp v. Pulver* (1848) 5 Barb. 91 (cutting and removing wood); *Clarke v. Cummings* (1849) 5 Barb. 339 (cutting timber and wood); *Ireland v. Nichols* (1871) 46 N. Y. 413 (breach of covenant as to subletting); *Collins v. Hasbrouck* (1874) 56 N. Y. 157, 15 Am. Rep. 407 (breach by subletting); *Murray v. Harway* (1874) 56 N. Y. 337 (breach by assignment); *Riggs v. Pursell* (1876) 66 N. Y. 193 (covenant not to transfer); *Michel v. O'Brien* (1894) 6 Misc. 408, 27 N. Y. Supp. 173 (subletting); *Koehler v. Brady* (1894) 78 Hun, 443, 29 N. Y. Supp. 388, reversed on other grounds in (1894) 144 N. Y. 135, 38 N. E. 978 (assigning); *Clark v. Greenfield* (1895) 13 Misc. 124 (breach by assigning); *Hinton v. Bogart* (1912) 78 Misc. 46, 137 N. Y. Supp. 697 (nonpayment of taxes); *Paddell v. Janes* (1914) 84 Misc. 212, 145 N. Y. Supp. 868 (breach by assigning).

NORTH CAROLINA.—*Richburg v. Bartley* (1853) 44 N. C. (Bisbee, L.) 418 (nonpayment of rent); *Winder v. Martin* (1922) — N. C. —, 111 S. E. 708 (breach of agreement by lessee to purchase gasoline to be retailed by them from lessor's firm).

OHIO.—*Buford v. Weigel* (1895) 3 Ohio S. & S. P. Dec. 55 (nonpayment of rent); *McHugh v. Regan* (1906) 28 Ohio C. C. 790 (nonpayment of taxes).

PENNSYLVANIA.—*Beatty v. Masavage* (1905) 15 Pa. Dist. R. 974 (selling liquor and nonpayment of taxes).

RHODE ISLAND.—*Smith v. Edgewood Casino Club* (1896) 19 R. I. 628, 35 Atl. 884, 36 Atl. 128 (breach by subletting); *Cavanaugh v. Cook* (1915) 38 R. I. 25, 94 Atl. 663 (nonpayment of rent).

TENNESSEE.—*Barrasso v. Tennessee Brewing Co.* (1911) 1 Tenn. C. C. A. 662 (nonpayment of rent).

VERMONT.—*Rosenberg v. Taft* (1920) — Vt. —, 111 Atl. 583 (nonpayment of rent).

VIRGINIA.—*McKildoe v. Darracott* (1856) 13 Gratt. 278 (breach by subletting); *McGhee v. Cox* (1914) 116 Va. 718, 82 S. E. 701, Ann. Cas. 1916E, 842 (breach of covenant against assignment).

WASHINGTON.—*Pettygrove v. Rothschild* (1891) 2 Wash. 6, 25 Pac. 907 (breach of covenant as to alterations); *Cuschner v. Westlake* (1906) 43 Wash. 690, 86 Pac. 948 (nonpayment of rent).

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WISCONSIN.—*Gomber v. Hackett* (1857) 6 Wis. 323, 70 Am. Dec. 467 (year's rent received with knowledge of breach of covenant as to cutting timber); *Jolly v. Single* (1862) 16 Wis. 281 (subletting, suffering machinery to get out of repair, and failing to run mill to capacity); *Katz v. Miller* (1912) 148 Wis. 63, 133 N. W. 1091, Ann. Cas. 1913A, 1199 (assignment and subletting).

ENGLAND.—*Goodright v. Davids* (1778) Cowp. pt. 2, p. 804, 98 Eng. Reprint, 1371 (breach of covenant as to underletting); *Marsh v. Curteys* (1596) Cro. Eliz. pt. 2, p. 528, 78 Eng. Reprint, 775 (breach of covenant not to part land from house); *Arnsby v. Woodward* (1827) 6 Barn. & C. 517, 108 Eng. Reprint, 543 (nonpayment of rent); *Doe ex dem. Griffith v. Pritchard* (1833) 5 Barn. & Ad. 765, 110 Eng. Reprint, 973, 2 Nev. & M. 489, 3 L. J. K. B. N. S. 11 (breach by lessee becoming insolvent); *Doe ex dem. Gatehouse v. Rees* (1838) 4 Bing. N. C. 384, 132 Eng. Reprint, 835, 6 Scott, 161, 1 Arnold, 159, 7 L. J. C. P. N. S. 184 (lessees in solvency); *Bridges v. Longman* (1857) 24 Beav. 27, 53 Eng. Reprint, 267 (breach as to trade carried on); *Pellatt v. Boosey* (1862) 8 Jur. N. S. 1107, 31 L. J. C. P. N. S. 281 (failure to repair); *Walrond v. Hawkins* (1875) 44 L. J. C. P. N. S. 116, L. R. 10 C. P. 342, 32 L. T. N. S. 119, 23 Week. Rep. 390 (breach by underletting); *Evans v. Wyatt* (1879) 43 L. T. N. S. 176, 44 J. P. 767 (unauthorized assignments and subleases); *Griffin v. Tomkins* (1880) 42 L. T. N. S. 359, 44 J. P. 457 (breach of covenant against occupying for business purposes); *Jacob v. Down* (1900) 2 Ch. 156, 69 L. J. Ch. N. S. 493, 64 J. P. 552, 48 Week. Rep. 441, 83 L. T. N. S. 191 (breach of covenant as to erection of building).

IRELAND.—*Clifford v. Reilly* (1869) Ir. Rep. 4 C. L. 218 (breach of assignment).

CANADA.—*Roe v. Southard* (1861) 10 U. C. C. P. 488 (covenant to build house within certain time); *Cornish v. Boles* (1914) 31 Ont. L. Rep. 505, 19 D. L. R. 447 (breach of assignment); *Isman v. Widen* (1920) — Sask. —, 55 D. L. R. 184 (breach of covenant as to gambling on the premises).

And in *Cortes v. Dy-Jia* (1906) 7 Philippines, 238, where, after a breach by assigning, rent for an ensuing month was accepted, there was held a waiver of the right to declare a forfeiture.

And it has been held that a right to declare a forfeiture for failure to furnish the lessor of a quarry with copies of contracts to deliver rock was waived where the lessor for a considerable period received the rents and royalties without making any demand for a forfeiture. *Little Rock Granite Co. v. Shall* (1894) 59 Ark. 405, 27 S. W. 562.

And in *Holland v. Rhode Island Roofing Co.* (1916) 39 R. I. 108, 97 Atl. 596, where the lease provided that in case of damage by fire, 10 B. R. C.

if the lessor should not elect to repair, the lease should terminate, it was held that the right to terminate on account of a fire was waived by the receipt of rent accruing after the fire.

And in *Horn v. Peteler* (1885) 16 Mo. App. 438, it was held that the taking from a tenant from month to month of a promissory note for past-due rent, and the acceptance of rent subsequently accruing, was a waiver of the right to enforce a forfeiture under the statute for nonpayment of rent.

And in *Hukill v. Myers* (1892) 36 W. Va. 639, 15 S. E. 151, it was held that the right to declare a forfeiture for failure to pay rent as provided in a lease was waived, where the lessor allowed the rent to run for a long period after the dates for payment, and then made demands for it and accepted payments.

And it has been held that the acceptance of rent accruing after a breach of covenant not to commit waste or a nuisance waived the right to enter for the breach, where it was received as rent, and not as liquidated damages, under a provision of the lease that after its termination the lessee should pay for the demised premises. *Kenny v. Seu Si Lun* (1907) 101 Minn. 253, 11 L.R.A.(N.S.) 831, 112 N. W. 220, 11 Ann. Cas. 60.

And in *Leighton v. Medley* (1882) 1 Ont. Rep. 207, where a landlord knew that a tenant had moved a fence and made no objection, but accepted rent afterwards, there was held a waiver of the breach of the covenant with respect to fences.

And in *Ohio Valley Oil & Gas Co. v. Irrin Development Co.* (1919) 184 Ky. 517, 212 S. W. 110, it is stated that "acceptance of rent for the defaulted period, or any part of it, will generally be a waiver of the right to declare a forfeiture." It does not appear whether the court had in mind rent accruing after cause for forfeiture.

And in *Newman v. Rutler* (1839) 8 Watts, 51, evidence was held admissible in an action of ejectment of the receipt of rent, the court stating that it was pertinent because the receipt of rent would waive the forfeiture claimed for neglecting to erect buildings as provided in the deed.

It has been held that the payments of rent by a receiver of the lessee for the period of the receiver's occupancy will not amount to a waiver of forfeiture for prior arrearages in rent, as he was bound to pay for the use and occupation of the premises. *Fleming v. Fleming Hotel Co.* (1905) 69 N. J. Eq. 715, 61 Atl. 157.

And in *Medinah Temple Co. v. Currey* (1896) 162 Ill. 441, 53 Am. St. Rep. 320, 44 N. E. 839, where a lessee made a voluntary assignment for the benefit of creditors, it was held that the receiving of rent for the ensuing month from the assignee, before he had declared his purpose to accept the lease, did not amount to a waiver of the

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right to forfeit for a breach of the clause of the lease against assignments, it not being a payment according to the lease.

In *Re Frazin* (1910) 33 L.R.A.(N.S.) 745, 105 C. C. A. 320, 183 Fed. 28, the acceptance of rent from a trustee of a bankrupt lessee was held to waive the right to re-enter on account of the bankruptcy or the appointment of a receiver or trustee, but such acceptance was held not to waive a right to re-enter because of a devolution of the property, where there was no devolution until the trustee did some affirmative act accepting the lease.

In *McIntosh v. St. Philip's Church* (1890) 120 N. Y. 7, 23 N. E. 984, it was held that the receipt of rent under a lease, after knowledge of the erection of a carriage factory, would not constitute a waiver of an agreement in the lease to erect a dwelling house as a consideration for a renewal. The court said: "Receiving rent after forfeiture waives the forfeiture and affirms the lease freed from the condition. . . . Thus, if there is a condition that the tenant will not assign the lease or sublet the premises, and the landlord accepts the rent, knowing of such assignment or subletting, he affirms the lease without those conditions. . . . But in this case there was, after the execution of the release, no covenant on the part of the tenant to build, and therefore there could be no breach and no waiver of such a covenant. It was entirely optional with the tenant whether or not he should erect a building on the property; but if he desired to obtain the benefit of the landlord's covenant to renew, or pay for the building, he was bound to erect such a building as was specified in the lease, and to see to it that it was standing on the premises at the expiration of the term. There was no claim in this action that the building erected by the plaintiff complied with the lease."

The acceptance of a part of the rent due affirms the lease to the end of the period for which the partial payment was made, and precludes the lessor from claiming that the lease was forfeited within the same period because of the nonpayment of the rest. *Rosenberg v. Taft* (1920) — Vt. —, 111 Atl. 583.

Several cases have involved the question of waiver by reason of acceptance of rents paid in advance.

Thus, in *Marshall v. Davis* (1906) 122 Ky. 413, 91 S. W. 714, where, the day before the date set for trial of an inquisition in forcible detainer proceedings for nonpayment of rent, the lessor received the past-due rent, and also rent for a part of a month in advance, there was held a waiver of a right to declare a forfeiture for breach of the covenant as to payment.

And a right to forfeit a lease, providing for payment of rent in July, for nonpayment of rent, and an unlawful use of the premises, has been held waived, where the annual rent was received by the lessor in September and covered payment for five months in advance.
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Johnson v. Electric Park Amusement Co. (1911) 150 Iowa, 717, 130 N. W. 807.

And where the lessor served notice to quit or pay rent, and on the same day received payment of the back rent and a part of the rent for the ensuing month, it was held that he could not maintain an action of ouster during the portion of the month for which the rent was paid. *Barber v. Stone* (1895) 104 Mich. 90, 62 N. W. 139.

And where a lessee of a summer hotel, at the lessor's request, paid a year's rent in advance in December, the lessor was held estopped from saying that the house, which was closed as usual during the winter, was vacant in violation of the provisions of the lease. *Stoddard v. Gallagher* (1903) 133 Mich. 374, 94 N. W. 1051.

Where rental has been paid in advance of the due date, the lessor is not bound to refund such payment upon terminating the lease before such date by reason of the tenant's breach of a condition therein, and therefore the failure to return it cannot be deemed a waiver of the right to terminate the lease. *Thomas Peebles & Co. v. Sherman* (1921) 148 Minn. 282, 181 N. W. 715.

The court in *East Sioux Falls Quarry Co. v. Wisconsin Granite Co.* (1917) 39 S. D. 301, 164 N. W. 77, stated that the acceptance of rent after covenants broken might estop a landlord from claiming a forfeiture of the lease, but held that this rule had no application in that case, where it appeared that the lease was for five years, and that the rent had been paid in full to the termination of the lease, before a cause for forfeiture arose.

And in *Johnson v. Ft. Worth Driving Club* (1912) — Tex. Civ. App. —, 144 S. W. 1041, it was held that the acceptance of rent for several months in the future would not waive a cause for forfeiture in case of sales of intoxicating liquor, although the lessor knew that there was liquor on the premises when he accepted the rent, it appearing that the lessee assured him that further sales of liquor would not be permitted on the premises.

And in *Mageon v. Alkire* (1907) 41 Colo. 338, 92 Pac. 720, it was held that the receipt of water rent payable in advance, and which did not become due after a breach of covenants in the lease, did not waive a breach of the covenants.

In *Soper v. Littlejohn* (1901) 31 Can. S. C. 512, where a lease provided that in case of assignment by the lessee for the benefit of creditors six months' rent in advance should immediately become forfeited, it was held, upon an assignment for the benefit of creditors, that there was no waiver of the forfeiture because of the lessor's acceptance of six months' rent in advance, or by reason of the acceptance from a sublessee, entitled to steam and power, of rent for a short period after the forfeiture was declared by the lessor.

Acceptance of rent from a sublessee of one to whom the original

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lease had been assigned without the lessor's required consent does not operate as a waiver of a forfeiture of the original lease for non-payment of rent and nonperformance of covenants therein. *Queen v. Wythe Engraving Co.* (1921) — Mo. App. —, 233 S. W. 283.

c. Acceptance after action, or pending appeal.

The acceptance after the commencement of an action to terminate the tenancy, or pending an appeal, of money accruing for rent and occupation, is generally held not a waiver of the forfeiture.

Thus, it has been held that the receipt of rent each month after a writ of forcible entry and detainer has been sued out was not a waiver of the right to possession by reason of a violation of the clause as to subletting. *Cleve v. Mazzoni* (1898) 19 Ky. L. Rep. 2001, 45 S. W. 88. The court stated that the right of action for forfeiture had accrued, and that the tenant was notified that the landlord would claim a forfeiture, and that the lessee would be liable for use and occupation, and that if the landlord was willing to receive, and the tenant to pay the contract rental, this was merely an adjustment of the liability for use and occupation.

And in *Crawford v. Texas Improv. Co.* (1917) — Tex. Civ. App. —, 196 S. W. 195, the acceptance of rent due for the premises after filing suit to forfeit the lease was held not to waive the right to repossess the premises unless the facts showed an intention to waive.

The fact that the lessor, who has brought an action to recover possession after giving notice to terminate the tenancy because of the nonpayment of rent payable monthly in advance, has attempted to recover rent for the month following the date fixed by such notice for the termination of the tenancy, does not operate to waive the forfeiture, the bringing of the suit constituting an irrevocable election to declare the lease terminated. *Perry v. White.* (1920) 69 Colo. 234, 193 Pac. 543.

And in *Importers & T. Ins. Co. v. Christie* (1867) 5 Robt. 169, it was held that the acceptance, after the commencement of an action to recover possession, of rent accruing after a breach of a covenant against subletting, did not waive the cause of forfeiture.

And in *Delmar Realty Co. v. Alberstadt* (1912) 10 La. App. (Orleans) 148, where the landlord, after notice to vacate a tenancy from month to month, accepted rent for the property for the occupancy pending suit for possession, it was held that the defendant owed something for his occupancy, and that the acceptance raised no presumption of continuance of the tenancy.

And the receipt of rent after institution of suit to recover possession because of a breach of the covenant to operate a mine does not waive the cause for forfeiture. *Big Six Development Co. v. Mitchell* 10 B. R. C.

(1905) 1 L.R.A. (N.S.) 332, 70 C. C. A. 569, 138 Fed. 279, writ of certiorari denied in (1905) 199 U. S. 606, 50 L. ed. 330, 26 Sup. Ct. Rep. 746.

And in *Frazier v. Caruthers* (1892) 44 Ill. App. 61, it was held that the acceptance of property in payment of accrued rent after judgment obtained against the lessee for forfeiture because of unpaid rent was not a waiver of his right to enter for nonpayment of rent.

And in *Granite Bldg. Corp. v. Greene* (1904) 25 R. I. 586, 57 Atl. 649, where a lessor, claiming a breach of covenant not to sell intoxicating liquor, brought ejectment, and gave the statutory bond conditioned to pay all rent due pending the action, and the lessee gave the surety on the bond rent and he paid it to the lessor's attorney, who in the receipt given reserved all claims for forfeiture, although neither the lessor nor lessee knew of the reservation, it was held that the acceptance did not amount to a waiver, as the statute required the bond to be given, and the construction that rent received under such bond worked a discontinuance of the suit was held unreasonable.

And in *Palmer v. City Livery Co.* (1897) 98 Wis. 33, 73 N. W. 559, where the lessee gave an appeal bond in an action for possession conditioned on payment of rent during the pendency of the appeal, it was held that the acceptance of rent during the period of the appeal did not waive the right to forfeit because of a prior breach by nonpayment of rent.

And in *Chiera v. McDonald* (1899) 121 Mich. 54, 79 N. W. 908, it was held that the receipt of money to apply on rent pending an appeal in a summary proceeding to recover possession did not waive any of the complainant's rights; at least where it was less than the sum due.

In *Carter Pub. Co. v. Dennett* (1899) 11 S. D. 486, 78 N. W. 956, it was held that the plaintiff in an action for possession did not waive or abandon his judgment by receiving rent due before the suit was brought.

In *Crawford v. Waters* (1873) 46 How. Pr. 210, where a receiver of a lessor, after a breach for nonpayment of rent, brought summary proceedings for possession, and the tenant paid a sum into court to redeem his term as required by statute, alleging that the amount exceeded the rent in arrears, costs, and interest, which was accepted by the receiver, the court said: "If any part of the rent be received by the landlord which accrued subsequent to the breach, he again consents to and establishes tenancy, which it was competent for him to have avoided. But, after the landlord has avoided the lease by a judgment the effect may not be to restore the lease, yet I think it is a parol acknowledgment of tenancy."

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But where, after the commencement of an action for unlawful detainer, based upon an election to treat the lease as forfeited for breach of a covenant to give security, the lessor receives rent accruing subsequently to the date fixed by the notice to terminate the lease, as rent due under the lease and not as the value of the use and occupation of the premises after the forfeiture of the lease, the forfeiture is waived. *Jones v. Della Maria* (1920) — Cal. App. —, 191 Pac. 943.

In *McMullen v. Vannatto* (1894) 24 Ont. Rep. 625, which was an action of distress for rent that became due after breach, and pending an action of ejectment, it was held that the effect of the receipt was not to set up the former tenancy which ended on the election to forfeit, but that it was evidence of a new tenancy on the same terms from year to year.

A demand, in an action to recover possession of leased premises because of a breach of covenant, for judgment of a sum of money as rent due prior to the notice of forfeiture, but covering a period of time largely after notice of the breach, cannot be considered as a waiver of such breach, since it cannot be inferred that by setting up a mere incident allowed by the statute it was intended to waive the primary purpose of the suit. *Harris v. Bissell* (1921) — Cal. App. —, 202 Pac. 453.

d. Requirement of knowledge of breach.

It is a well-settled qualification of the rule that the acceptance of rent effects a waiver of causes of forfeiture, that the landlord must have had knowledge at the time of acceptance of the breach constituting the ground for forfeiture, and that a receipt of rent, even though it accrued after a cause for forfeiture, will not waive the right to forfeit where the landlord had no knowledge of the cause for forfeiture. *Mulligan v. Hollingsworth* (1900) 99 Fed. 216 (breach of provision as to cultivation); *German-American Sav. Bank v. Gollmer* (1909) 155 Cal. 683, 24 L.R.A.(N.S.) 1066, 102 Pac. 932 (breach by assigning); *Goodwin v. Grosse* (1922) — Cal. App. —, 206 Pac. 138, and *Hepp Wall Paper & Mercantile Co. v. Deahl* (1912) 53 Colo. 274, 125 Pac. 491 (unauthorized underletting); *Kew v. Trainor* (1893) 50 Ill. App. 629, affirmed in (1894) 150 Ill. 150, 37 N. E. 223 (breach by assignment); *Biehl v. Wiedemann* (1920) 189 Ky. 362, 224 S. W. 1057; *Thomas Peebles & Co. v. Sherman* (1921) 148 Minn. 282, 181 N. W. 715; *Walker v. Engler* (1860) 30 Mo. 131 (breach by making alterations); *Keeler v. Davis* (1856) 5 Duer, 507 (breach of provision as to assignment); *Jesse French Piano & Organ Co. v. Hallberg* (1914) 130 Tenn. 650, 172 S. W. 298 (breach by assignment); *Jones v. Roberts* (1809) 3 Hen. & M. (Va.) 436 (breach as to care and improvements); *Pennants Case* 10 B. R. C.

(1596) 3 Coke, 64a, 76 Eng. Reprint, 775 (breach by assignment); *Roe ex dem. Gregson v. Harrison* (1788) 2 T. R. 425, 100 Eng. Reprint, 229, 1 Revised Rep. 513 (nonpayment of rent); *Harvey v. Oswald* (1596) Cro. Eliz. pt. 2, p. 553, 78 Eng. Reprint, 798 (breach by default in payment of rent); subsequent appeal in *Harvie v. Oswel* (1597) Cro. Eliz. pt. 2, p. 572, 78 Eng. Reprint, 816 (default in payment of rent); *Armstrong v. Canada Co.* (1905) 6 Ont. Week. Rep. 888 (breach of covenant against subletting); *Fitzgerald v. Barbour* (1908) 11 Ont. Week. Rep. 390 (breach by assigning).

And it has been held that receipt of rent accruing after a breach by an assignment was not a waiver of the cause for forfeiture, where the lessor did not know that a cause for forfeiture existed when he received the money, although the one authorized by him to receive the rent knew it. *Tober v. Collins* (1906) 130 Ill. App. 333.

And the acceptance of rent, after a cause for forfeiture has accrued by making a hole in a party wall, was held not to waive the cause for forfeiture where the lessor had no knowledge of the breach, although information had been received that repairs were contemplated. *Holman v. Knox* (1912) 25 Ont. L. Rep. 588, 3 D. L. R. 207.

And the acceptance of rent from the executor of the lessee is not a waiver of breach of the condition against assignment and transfer, although the lessor had knowledge that the lessee had mortgaged his interest, but did not know that there had been a default in the payment of the debt. *West Shore R. Co. v. Wenner* (1903) 70 N. J. L. 233, 103 Am. St. Rep. 801, 57 Atl. 408, 1 Ann. Cas. 790, affirmed in (1905) 71 N. J. L. 682, 60 Atl. 1134.

And it has been held that the receipt by one selectman of rent for school lands for a certain year, without knowledge that the rent for preceding years was unpaid, did not waive the right to maintain an action of ejectment because of the nonpayment of such rents. *Maidstone v. Stevens* (1835) 7 Vt. 487.

II. Waiver of breach of continuing covenants.

a. Generally.

The authorities are agreed that an acceptance of rent, even though it accrued subsequently to a cause for forfeiture, does not waive a future breach of a continuing covenant or condition.

UNITED STATES.—*Mulligan v. Hollingsworth* (1900) 99 Fed. 216; *Big Six Development Co. v. Mitchell* (1905) 1 L.R.A. (N.S.) 332, 70 C. C. A. 569, 138 Fed. 279, writ of certiorari denied in (1905) 199 U. S. 606, 50 L. ed. 330, 26 Sup. Ct. Rep. 746.

CALIFORNIA.—*Jones v. Durrer* (1892) 96 Cal. 95, 30 Pac. 1027; *Myers v. Herskowitz* (1917) 33 Cal. App. 581, 165 Pac. 1031; 10 B. R. C.

Matthews v. Digges (1920) — Cal. App. —, 188 Pac. 283; *Jones v. Della Maria* (1920) — Cal. App. —, 191 Pac. 943.

MASSACHUSETTS.—*Seaver v. Coburn* (1852) 10 Cush. 324.

MICHIGAN.—*Alexander v. Hodges* (1879) 41 Mich. 691, 3 N. W. 187; *Pendill v. Union Min. Co.* (1882) 64 Mich. 172, 31 N. W. 100.

MINNESOTA.—*Gluck v. Elkan* (1886) 36 Minn. 80, 30 N. W. 446; *Zotalio v. Cannellos* (1917) 138 Minn. 179, L.R.A.1918A, 1066, 164 N. W. 807.

MISSOURI.—*Farwell v. Easton* (1876) 63 Mo. 446.

NEW YORK.—*Jackson ex dem. Blanchard v. Allen* (1824) 3 Cow. 220; *Bleecker v. Smith* (1835) 13 Wend. 530; *Murray v. Harway* (1874) 56 N. Y. 337; *Conger v. Duryee* (1882) 90 N. Y. 594; *Ireland v. Nichols* (1871) 46 N. Y. 413.

OREGON.—*Johnson v. Seaborg* (1913) 69 Or. 27, 137 Pac. 191.

RHODE ISLAND.—*Granite Bldg. Asso. v. Greene* (1903) 25 R. I. 48, 54 Atl. 792.

TENNESSEE.—*Barrasso v. Tennessee Brewing Co.* (1911) 1 Tenn. C. C. A. 662.

VIRGINIA.—*McKildoe v. Darracott* (1856) 13 Gratt. 278.

ENGLAND.—*Doe ex dem. Boscawen v. Bliss* (1813) 4 Taunt. 734, 128 Eng. Reprint, 519; *Doe ex dem. Vickrey v. Jackson* (1817) 2 Starkie, 293; *Doe ex dem. Bryan v. Bancks* (1821) 4 Barn. & Ald. 401, 106 Eng. Reprint, 984, Gow, N. P. 220, 23 Revised Rep. 318, 15 Eng. Rul. Cas. 561, 6 Mor. Min. Rep. 278; *Doe ex dem. Ambler v. Woodbridge* (1829) 9 Barn. & C. 376, 109 Eng. Reprint, 140, 4 Mann. & R. 303, 7 L. J. K. B. 263, 28 Revised Rep. 426; *Doe ex dem. Muston v. Gladwin* (1845) 6 Q. B. 953, 115 Eng. Reprint, 359, 14 L. J. Q. B. N. S. 189, 9 Jur. 508, 15 Eng. Rul. Cas. 790; *New River Co. v. Crumpton* (1917) 1 K. B. 762, 86 L. J. K. B. N. S. 614, 116 L. T. N. S. 569.

CANADA.—*Ainley v. Balsden* (1857) 14 U. C. Q. B. 535; *Thompson v. Baskerville* (1877) 40 U. C. Q. B. 614.

But though the waiver of the breach of a continuing covenant will not preclude the landlord from taking advantage of a cause of forfeiture that occurs subsequently to such waiver, the waiver will discharge any forfeiture occurring previously thereto. *Jones v. Della Maria* (1920) — Cal. App. —, 191 Pac. 943.

In *Alexander v. Hodges* (1879) 41 Mich. 691, 3 N. W. 187, covenants to keep the premises free from encumbrances, and to comply with ordinances relating to business, were held continuing conditions, and there was held no waiver of the right to enter for subsequent breach thereof by reason of the acceptance of rent.

It was contended in *McGlynn v. Moore* (1864) 25 Cal. 394, that a covenant to erect a building at a certain date was a continuing one, and that there was a continuing cause for forfeiture after the receipt 10 B. R. C.

of rent accrued, where the lessee still neglected to build; but it was held that the covenant was not a continuing one.

b. Covenants to carry on certain business, or work premises in specified way.

It has been held that a covenant to run a saloon during the term of a lease is a continuing one, and that a receipt of rent is not a waiver of a continuing breach thereof. *Barrasso v. Tennessee Brewing Co.* (1911) 1 Tenn. C. C. A. 662.

But compare *Adams-Flanigan Co. v. Kling* (1921) 198 App. Div. 717, 191 N. Y. Supp. 32, in which it was held that a provision of a lease requiring the demised premises to be used for saloon purposes only is waived by the acceptance of rent after the premises have, by reason of the enactment of the National Prohibition Act, been put to another use.

In *Doe ex dem. Bryan v. Bancks* (1821) 4 Barn. & Ald. 401, 106 Eng. Reprint, 984, Gow, N. P. 220, 23 Revised Rep. 318, 15 Eng. Rül. Cas. 561, 6 Mor. Min. Rep. 278, where a lease of a mine provided that it should be null and void upon a cesser to work for two years, the receipt of rent after a cesser of work for two years was held not a waiver of the right to forfeit for a continuing breach, and that it did not create a new tenancy from year to year.

And in *Jones v. Durrer* (1892) 96 Cal. 95, 30 Pac. 1027, it was held that where the covenants broken are continuing in their nature, such, for example, as covenants with reference to the manner of conducting a farm, the receipt of accrued rent, while it might waive breaches already existing, would not waive subsequent breaches.

And in *Bleecker v. Smith* (1835) 13 Wend. 530, a covenant to plant and replace a certain number of trees was held a continuing one, subsequent breaches of which were not waived by the receipt of rent.

And in *Big Six Development Co. v. Mitchell* (1905) 1 L.R.A. (N.S.) 332, 70 C. C. A. 569, 138 Fed. 279, writ of certiorari denied in (1905) 199 U. S. 606, 50 L. ed. 330, 26 Sup. Ct. Rep. 746, a covenant to work a mine in a workmanlike manner was held a continuing one, and a receipt of rent was held not to waive subsequent breaches.

c. Covenants not to use in certain way.

The acceptance of rent accruing subsequently to a breach of a covenant against the sale of intoxicating liquor on the premises has been held not to preclude the lessor from declaring a forfeiture for a continuing breach of the covenant. *Granite Bldg. Asso. v. Greene* (1903) 25 R. I. 48, 54 Atl. 792. The court said: "The plaintiff's counsel took an exception to that part of the charge which was to the

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effect that the jury were to determine whether the acceptance of rent in January, 1902, was a waiver of the plaintiff's right to insist upon a forfeiture of the lease. That is to say, as we understand it, the exception was to the instruction that it was competent for the jury to find that if the plaintiff accepted the rent for January, 1902, after knowledge on its part of the violation by defendants of the covenant aforesaid, it had waived its right to insist on the forfeiture of the covenant in the lease, the court saying 'that if the right was then waived, it is still waived.' In view of the facts which appeared in evidence relative to the continued violation by the defendants of the covenant in question, we are of the opinion that the rule as thus laid down by the court was too narrow. For, while it is doubtless true that as a general rule a waiver of a forfeiture occurs by an acceptance of rent which became due after a breach of covenant by the lessee, which breach was known to the lessor at the time of accepting the rent . . . it is also true that there are well-known exceptions to such rule. And one of these exceptions is whether there is a continuing cause of forfeiture. In such case the lessor is not precluded from taking advantage of the forfeiture by having received rent which accrued after the breach was originally committed. An example of a case of this sort which bears directly on the case at bar is that given by Mr. Taylor, Landlord & Tenant, § 500, where the forfeiture was incurred by using two rooms in a house in a manner prohibited by the lease. The user under such circumstances in the case relied on by the author in support of the text was held to be a continuing breach, and the landlord was allowed to recover after receiving rent, provided the user continued after such receipt."

And the receipt of rent does not waive a breach of a covenant not to cultivate land, it being a continuing covenant. *Mulligan v. Hollingsworth* (1900) 99 Fed. 216.

And it has been held that a covenant that rooms shall not be used for certain purposes is a continuing one, and that the receipt of rent does not prevent the declaring of a forfeiture for a continued breach of it. *Doe ex dem. v. Woodbridge* (1829) 9 Barn. & C. 376, 109 Eng. Reprint, 140, 4 Mann. & R. 303, 7 L. J. K. B. 263, 28 Revised Rep. 426.

And in *Farwell v. Easton* (1876) 63 Mo. 446, it was held that the receipt of rent accruing after a breach of a condition restricting the use of premises to certain purposes was not a waiver of subsequent breaches of that covenant, as it was a continuing one.

d. Covenants to repair.

It has been held that the acceptance of rent does not waive the right to re-enter for breaches of covenants to keep farm fences in
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repair, and to keep a certain number of acres in meadow, since they are continuing breaches. *Ainley v. Baldsden* (1857) 14 U. C. Q. B. 535; *Thompson v. Baskerville* (1877) 40 U. C. Q. B. 614.

And in *New River Co. v. Crumpton* (1917) 1 K. B. 762, 86 L. J. K. B. N. S. 614, 116 L. T. N. S. 569, a covenant to repair was held a continuing one, and it was held that while the acceptance of rent accruing after a breach waives the breaches to that time, it does not waive subsequent breaches.

And in *Doe ex dem. Vickrey v. Jackson* (1817) 2 Starkie, 293, the breaking of a doorway through a wall, and keeping it open for a long period, was held a continuing breach of the covenant to repair, which was not waived by the receipt of rent after the lessor had knowledge of the breach.

And in *Fryett ex dem. Harris v. Jeffreys* (1795) 1 Esp. 393, where the lease gave a right of entry in three months after notice that the premises were out of repair, it was held that the acceptance of rent after the expiration of the three months would not waive the right to maintain ejectment, especially where the repairs were not then made.

In *Doe ex dem. Baker v. Jones* (1850) 19 L. J. Exch. N. S. 405, 5 Exch. 498, 155 Eng. Reprint, 218, it was held that there is no breach of a covenant to repair until the tenant fails to repair within a reasonable time after the repair is necessary, and that receipt of rent before the expiration of that reasonable time does not cause such time to begin to run afresh from the receipt of such rent.

In *Holderness v. Lang* (1886) 11 Ont. Rep. 1, an acceptance of after-accruing rent was held to waive a breach of a covenant to repair, the court here holding that such a covenant was not a continuing one.

e. Covenants to keep premises free or unobstructed.

It has been held that a covenant in a lease that the lessee shall keep a stairway and area open is a continuing covenant, and that the receipt of rent accruing after a breach thereof, while it waives breaches up to the time of acceptance, will not waive future breaches. *Gluck v. Elkan* (1886) 36 Minn. 80, 30 N. W. 446.

And in *Jackson ex dem. Blanchard v. Allen* (1824) 3 Cow. 220, it was held that although the acceptance of rent accruing after a breach of a covenant not to obstruct the premises, with knowledge thereof, waived the breach to the time of receipt, yet that the covenant not to obstruct was a continuing one and that subsequent breaches were not waived by such receipt.

In *Myers v. Herskowitz* (1917) 33 Cal. App. 581, 165 Pac. 1031, a covenant by a lessee to keep a certain space free for ingress and egress
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was held a continuing one, and there was held no waiver of the lessor's right to prosecute an action of unlawful detainer where, after he commenced the action, he continually objected to the way the lessee used the space, and after the dates on which the instalments of rent were due drew money from the bank which the lessee had deposited in payment of the rent. The court said: "The defendant admitted that he received from the plaintiff two letters prior to the time of the notice served on June 4th. One of these stated that the defendant occupied too much space around a certain post at the side of the aisle. The second letter, dated March 17, 1914, called defendant's attention to the aisle space in question here. During the month of May, 1914, additional violations of the same covenant of the lease took place. Thereafter the plaintiff proceeded as above stated, and diligently prosecuted this action. Under these circumstances we think that the conduct of the plaintiff in accepting the money, not in advance, but after the completion of the several months, was not a waiver of his right to prosecute the action. The covenant was of a continuing nature, the defendant was continuing to violate it, and the plaintiff was continuing to object to such violation and continuing his attempt to obtain possession of the premises. The tenant having succeeded in retaining possession of the premises during the pendency of the action, plaintiff was entitled to compensation therefor; and after the benefit had been received by the defendant the plaintiff might reasonably accept such compensation to which he was entitled without being held to have waived the right of action which he was then prosecuting."

f. Covenants to insure, pay taxes, or rent.

It has been held that a covenant to insure in the joint names of lessor and lessee is a continuing one, and that the receipt of rent waives only past breaches, and does not preclude an action of ejectment for future breaches. *Doe ex dem. Muston v. Gladwin* (1845) 6 Q. B. 953, 115 Eng. Reprint, 359, 14 L. J. Q. B. N. S. 189, 9 Jur. 508, 15 Eng. Rul. Cas. 790.

In *Conger v. Duryee* (1882) 90 N. Y. 594, it was held that receiving rent, accruing after a breach of a covenant to pay taxes, waived the right to declare a forfeiture for nonpayment of taxes, waived the right of receipt of the rent, but that it did not waive the right to insist on a forfeiture for a subsequent nonpayment of taxes, the covenant being a continuing one. The court said: "A single condition dispensed with is dispensed with forever. Receiving rent after forfeiture waives the forfeiture and affirms the lease, freed from the condition. Thus, where the condition is that the tenant shall not assign the lease, and he does assign it, and the landlord, with knowl-
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edge of the assignment, accepts the rent, he affirms the lease without its condition, and the assignee of the tenant may assign. *Murray v. Harway* (1874) 56 N. Y. 337. So, with the condition that the tenant shall not underlet, and he does underlet a portion of the premises, and the landlord, with a knowledge of this fact, receives rent, he affirms the lease with the condition modified to the extent that the tenant has underlet at the time of affirming the lease. . . .

But it is said that where there is a continuing cause of forfeiture, the landlord will not be precluded from taking advantage of it by receiving rent after the breach was originally committed. So, where the forfeiture was incurred by using two rooms in a house in a manner prohibited by the lease, such user was held to be a continuing breach and that the landlord might recover after receiving rent, provided the user continued after such receipt. . . . And where there was a covenant on the part of the lessee that he would plant a certain number of apple trees upon a farm, and would replace those that should decay or get destroyed, so as always to keep up the given number during the term, there was a continuing covenant, and if the landlord should collect rent after he knew there was a breach of such a covenant, it would not waive the forfeiture, or prevent the landlord from re-entering, if subsequent to the payment of such rent there should still be a failure on the part of the tenant to perform his engagement. . . .

We think the phrase 'a continuing cause of forfeiture,' found in some of the reported cases, is not strictly accurate, and is misleading. Leases may contain continuing covenants and continuing conditions; that is to say, covenants and conditions which are to continue throughout the term, which, being violated by the lessee at any time during the term, give to the landlord under the re-entry clause a right to terminate the lease. But any breach of the condition or covenant creating a forfeiture must consist of some specific act or omission, which act or omission is the cause of the forfeiture, and continues only until the landlord shall elect whether to affirm or disaffirm the lease. When committed by the lessee, if the lease gives the landlord the right to re-enter for such breach, he has a right of election. He may elect to terminate the lease because of the breach, or he may elect to affirm it notwithstanding the breach. If he elects to terminate it, the relation of landlord and tenant ceases. He is not entitled to claim or demand rent, for rent flows from the lease, and there is no lease. If he elects to affirm, the affirmance is equivalent to a new lease with the same continuing covenants and conditions. No past breach can be used upon which to hinge a right of re-entry. Such right can again arise only in case of a new and positive breach of the covenants or conditions of the lease occurring subsequent to its affirmance. In the case where the forfeiture was incurred by using two rooms in a house in a manner prohibited by the

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lease, the landlord, having accepted rent and afterward bringing an action for a breach, would be estopped from proving the default of the tenant prior to the acceptance of the rent, and would be compelled to rely exclusively upon the evidence of acts constituting a breach occurring subsequent to the acceptance of such rent. And so in the case of the agreement on the part of the lessee to plant and keep upon the farm a given number of apple trees during the term, the court says: "The lessee was bound during the continuance of his term to preserve the number of apple trees, and the lessor is at liberty at any time to enforce forfeiture when a default exists or accrues after the payment of rent. The acceptance of rent waives all forfeitures up to that time. The lessor cannot show any default of the lessee previous to the payment of rent." So, in the case of a breach of a covenant to repair, acceptance of rent estops the landlord from showing a failure to repair prior to such acceptance. But the covenant in the lease operates from the day of its renewal, and the landlord is at liberty to show that since such renewal there has been a failure to perform the covenant. In none of these cases is it strictly accurate to say that there is a 'continuing cause of forfeiture.' The covenants continue, but the particular breach which is the cause of forfeiture does not. Applying this principle to the covenant in question, it is apparent that the acceptance of the rent, with knowledge of the nonpayment of the taxes, waived the forfeiture and affirmed the lease. The plaintiffs did not thereby release their claim against the lessee for the taxes; he is still liable in an action upon his covenant to pay; but they did waive their right to re-enter for such nonpayment, and as to such breach the lease stands as it would have stood had it contained a covenant to pay without the right to re-enter for nonpayment. The covenant to pay taxes operates only from the affirmance of the lease. Reading the lease as from the date of its affirmance by the acceptance of rent, the covenant of the lessee is that he 'will pay and discharge all the taxes, etc., which shall or may at any time or times within said terms be laid upon the premises.' There is no covenant to pay back taxes or back assessments."

In *Johnson v. Seaborg* (1913) 69 Or. 27, 137 Pac. 191, where a lease provided for a forfeiture in case the annual rent was not paid within thirty days after it became due, it was held that the acceptance of rent for one year after maturity was a waiver of a default for that year, but not for the next year.

In *Pendill v. Union Min. Co.* (1887) 64 Mich. 172, 31 N. W. 100, it was held that the mere payment of rent, or royalties, after cause for forfeiture for nonpayment, would not, unless fully paid, waive the forfeiture, as it would be a continuing cause of breach.

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g. Covenants against subletting or assigning.

It has been held that although a landlord who, with knowledge of the breach, accepts rent accruing after a subletting in violation of a condition of the lease, waives the right to declare a forfeiture on account of that particular subletting, yet, as the condition is a continuing one, a new subletting will constitute a ground for forfeiture. *Seaver v. Coburn* (1852) 10 Cush. 324; *Zotalio v. Cannellos* (1917) 138 Minn. 179, L.R.A.1918A, 1066, 164 N. W. 807; *Farr v. Kenyon* (1898) 20 R. I. 376, 39 Atl. 241; *Ireland v. Nichols* (1871) 46 N. Y. 413; *McKildoe v. Darracott* (1856) 13 Gratt. 278; *Doe ex dem. Boscawen v. Bliss* (1813) 4 Taunt. 735, 28 Eng. Reprint, 519.

It has been held that the condition in a lease not to assign is not a continuing one, and that the lessor, by accepting rent accruing after a breach, and with knowledge thereof, cannot avoid it for a subsequent assignment. *Murray v. Harway* (1874) 56 N. Y. 337.

h. Covenant to give security.

The acceptance of rent after giving notice to terminate the tenancy because of the lessee's failure to perform his covenant to give security will preclude the lessor from maintaining an action of unlawful detainer based upon such notice, even though the covenant be a continuing covenant, and its breach a continuing breach; but he must first renew his election to treat the lease as forfeited by giving a new notice. *Jones v. Della Maria* (1920) — Cal. App. —, 191 Pac. 943.

III. Waiver of notice to quit.

It is generally held that an acceptance of rent, accruing after a notice to quit for breach of a covenant or condition, is a waiver of the notice. *Speer v. Smoot* (1908) 156 Ala. 456, 47 So. 256; *Stromberg v. Western Teleph. Constr. Co.* (1899) 86 Ill. App. 270; *Collins v. Cauty* (1850) 6 Cush. 415; *Pappas v. Stark* (1913) 123 Minn. 81, 142 N. W. 1046; *Prindle v. Anderson* (1838) 19 Wend. 390; *Goodright ex dem. Charter v. Cordwent* (1793) 6 T. R. 219, 101 Eng. Reprint, 520, 3 Revised Rep. 161.

And in *Lehmann v. Chicago* (1917) 203 Ill. App. 414, it was held that a notice given a tenant to quit the premises at the expiration of his lease, according to its terms, was waived by the landlord demanding and receiving rent after such expiration of the lease.

And in *Muyo v. Claffin* (1919) 93 Vt. 76, 106 Atl. 653, where a lessor unqualifiedly accepted rent from March 15th to April 15th, it was held that the tenancy was unequivocally recognized as existing at the latter date, and that there was a waiver of notice to terminate the tenancy on March 15th.

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And in *Byrne v. Morrison* (1905) 25 App. D. C. 72, it was held that the receipt, after notice to quit, of rent for a new term, or a part thereof, amounted to a waiver of the right to demand possession under that notice, but that receipt of rent for the current month pending the notice to quit did not waive the right to demand possession.

And in *Blythe v. Dennett* (1853) 13 C. B. 178, 138 Eng. Reprint, 1165, 22 L. J. C. P. N. S. 79, it was held that the payment and acceptance of rent accruing subsequently to the expiration of notice to quit was a waiver of the notice and created a new contract, but that the payment and acceptance of rent for the occupation of the premises prior to that time did not necessarily have that effect.

The acceptance of rent in advance operates as a waiver of a notice previously given to terminate the tenancy. *Rosenberg v. Taft* (1920) — Vt. —, 111 Atl. 583.

The acceptance, after notice given to terminate a tenancy, of rent accruing prior to the time fixed for its termination, is not a waiver of such notice. *Eddins v. Galloway Coal Co.* (1921) 205 Ala. 361, 87 So. 557; *Norris v. Morrill* (1861) 43 N. H. 213; *Ginsburg v. Leit* (1921) 187 N. Y. Supp. 450; *Thompson v. Artrip* (1921) — Va. —, 108 S. E. 850.

The acceptance of rent "without prejudice" for a part of the period during which the tenant has held over after the date on which he was given notice to quit does not operate as a continuance of the tenancy. *Sunkenberg v. Jespersen* (1922) 191 N. Y. Supp. 689.

In *Doe ex dem. Cheney v. Batten* (1775) Cowp. pt. 1, p. 243, 98 Eng. Reprint, 1066, 9 East, 314, note, 103 Eng. Reprint, 593, note, 9 Revised Rep. 570, note, the acceptance of rent accrued after time for quitting, according to a notice given by the lessor, was held not *per se* a waiver of the notice, but the question of waiver was held one of intention, and for the jury.

In *Maxwell v. Brayshaw* (1919) 49 App. D. C. 57, 258 Fed. 957, it was held that the acceptance of one month's rent, pending the running of a notice to quit, did not operate as a waiver of the plaintiff's right to demand possession under the notice.

And in *Re Schoelkopf* (1907) 54 Misc. 31, 105 N. Y. Supp. 477, it was held that notice to vacate was not waived where the lessor received rent up to the date on which, by the notice, the term was to expire.

And there was held to be no waiver of notice to quit for breach of a covenant to erect and complete a new building by a certain time, where the lessee was entitled to four months' notice, and rent was received after the notice was given, covering only a portion of the time to the date on which the four months' notice expired. *Lindeke v. Associates Realty Co.* (1906) 77 C. C. A. 56, 146 Fed. 630.

And there was held to be no waiver of notice to terminate a lease
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in accordance with its provisions in case of fire, where the lessor commenced an action in unlawful detainer and subsequently entered into a settlement with the lessee, and received rent computed to the time of settlement. *Kahn v. American Ins. Co.* (1917) 137 Minn. 16, 162 N. W. 685.

It has been held that the receipt of rent after an action of ejectment has been begun and notice to quit given does not waive the notice. *Laxton v. Rosenberg* (1886) 11 Ont. Rep. 199; *Doe ex dem. Ash v. Calvert* (1910) 2 Campb. 387, 11 Revised Rep. 745.

And in *Den ex dem. Stedman v. McIntosh* (1845) 27 N. C. (5 Ired. L.) 571, it was held that there was no waiver of a notice to quit, or an acknowledgment of tenancy, where it appeared that the lessor brought a suit of ejectment, and subsequently sued out warrants to recover for the use and occupation of the premises, and money was received after the lessee had left the premises for damages for use and occupation.

In *New River Co. v. Crumpton* [1917] 1 K. B. 762, 86 L. J. K. B. N. S. 614, 116 L. T. N. S. 569, although a statute required notice to be served on the lessee as a condition precedent to the enforcement of a forfeiture by action, where the lessor, after a breach by failing to repair, and after notice to enforce a forfeiture, received rent subsequently accruing, it was held that an action to enforce the forfeiture could be maintained without giving a new notice, notwithstanding that the tenant had meanwhile done a few items of the repairs.

The court in *Davies v. Bristow* (1920) 3 K. B. 428, and *Shuter v. Hersh* (1921) 38 Times L. R. 127, refused to follow the decision in the reported case (*HARTELL v. BLACKLER*, *ante*, 478), which is set out under IV. *infra*, and held that there was no waiver of notice to quit, or renewal of the tenancy on the old terms, by reason of the acceptance of rent after the expiry of notice from a tenant of a house to which the Increase of Rent Act applied, as under the circumstances the tenant was bound to pay the rent, and the landlord had no choice but to accept it.

The acceptance of rent from a tenant holding over after expiration of his lease, by a landlord who has demanded surrender of possession at the expiration of an eight-day period, for such period, does not, as a matter of law, establish an implied renewal of the pre-existing rental contract, under which rent was payable in monthly instalments, but merely authorizes the inference that a rental contract was made for a definite period of eight days only. *Arrington v. Turner* (1922) — Ga. App. —, 110 S. E. 747.

IV. Effect of intention, or attempt to qualify acceptance.

It is generally held that a landlord cannot prevent a waiver resulting from his acceptance of rent by showing that he did not in-
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tend the acceptance to waive his rights. *Dahm v. Barlow* (1890) 93 Ala. 120, 9 So. 598; *Gulf, C. & S. F. R. Co. v. Settegast* (1891) 79 Tex. 257, 15 S. W. 228; *Croft v. Lumley* (1858) 6 H. L. Cas. 672, 10 Eng. Reprint, 1459, 27 L. J. Q. B. N. S. 321, 4 Jur. N. S. 903, 6 Week. Rep. 523, affirming (1855) 5 El. & Bl. 679, 119 Eng. Reprint, 634, 25 L. J. Q. B. N. S. 223, 2 Jur. N. S. 275, 4 Week. Rep. 375; *Davenport v. Queen* (1877) L. R. 3 App. Cas. 115, 47 L. J. P. C. N. S. 8, 37 L. T. N. S. 727; *Strong v. Stringer* (1889) 61 L. T. N. S. 470; *HARTELL v. BLACKLER* (reported herewith) *ante*, 478.

It will be observed that in the reported case (*HARTELL v. BLACKLER*, *ante*, 478), although the lessor stated that the money was not retained as rent, its acceptance was held a waiver of notice and a recognition of the continuance of the tenancy. In connection with this decision, see *Davis v. Bristow*, set out *supra*, III., where the court refuses to follow the *Hartell Case*.

In *Croft v. Lumley* (1858) 6 H. L. Cas. 672, 10 Eng. Reprint, 1459, 27 L. J. Q. B. N. S. 321, 4 Jur. N. S. 903, 6 Week. Rep. 523, relied on in the preceding case, where the lessor stated that he would not accept money tendered, after a breach by encumbering, as rent, but would accept it as compensation for the use since the breach, it was held that the lessee had the right to determine the way in which the money should be applied, and that the acceptance amounted to a waiver, although the lessor stated to the last that it was not accepted as rent.

And in *Davenport v. Queen* (1877) L. R. 3 App. Cas. 115, 47 L. J. P. C. N. S. 8, 37 L. T. N. S. 727, there was held a waiver of a breach of a covenant in a lease of Crown lands to cultivate and improve the land, where, with knowledge of a breach, rent for several succeeding years was received, although notice was given that it was received by the government conditionally, and without prejudice to its rights.

And in *Strong v. Stringer* (1889) 61 L. T. N. S. 470, it was held that a lessor could not, where he received rent, stipulate that it was received without prejudice to any breaches of covenants as to certain buildings, but that such breaches were waived by the receipt of the rent.

In *Gulf, C. & S. F. R. Co. v. Settegast* (1891) 79 Tex. 257, 15 S. W. 228, where the lessors received rent accruing after an alleged cause for forfeiture because of an assignment, it was held that there was a waiver of the cause for forfeiture, although it was stipulated that the acceptance of the rent was not a consent to the transfer. The court said: "The appellees seem to have proceeded, in part at least, upon the theory that the lease was forfeited, and this construction of the statute is the most favorable for them. It is hardly necessary to determine the question, for, in so far as this case is concerned, that construction may be conceded to be correct. A forfeiture may be waived

and, in our opinion, if there was a forfeiture of the lease by reason of the assignment, or of the construction by the Santa Fe Company of its road over the demised premises, it has been waived by the receipt by the lessors of the rent which was paid in January, 1884. It is well settled that an act of forfeiture is waived by receiving rent which afterwards accrues, provided the landlord have notice of the act of forfeiture at the time of the payment. It will not do for appellees to say that they declined to receive the payment for fear that they would thereby waive their rights against their lessors, and that they were told by the party making the tender that their rights would not be waived. It is a case in which actions are more effective than words."

And in *Dahm v. Barlow* (1890) 93 Ala. 120, 9 So. 598, it was held that a landlord who had accepted rent accruing after a cause for forfeiture could not explain his intention in accepting it and thereby prevent a waiver.

It has been held, however, that the acceptance of rent already accrued, accompanied by an express agreement that the breach of a covenant against the unlawful use of the premises was not thereby waived, did not preclude the lessor from entering for such breach. *Miller v. Prescott* (1895) 163 Mass. 12, 47 Am. St. Rep. 434, 39 N. E. 409.

And no inference of an intention on the part of the lessor to waive his right to forfeit the lease because of the lessee's failure to pay the rent promptly can be inferred from an acceptance of such rent, where such acceptance is accompanied by a declaration of a contrary intention, with due notification to the lessee. *Del Toro v. Juncos Central Co.* (1921; C. C. A.) 276 Fed. 894.

And in *Holman v. Knox* (1911) 25 Ont. L. Rep. 588, 3 D. L. R. 207, it was held that the receipt of rent after knowledge of cause for forfeiture by reason of making an opening in a party wall did not waive the cause for forfeiture where it was accepted without prejudice to the lessor's rights.

And it has been held that a receipt of rent due, after notice to quit has been given, is not a waiver of the notice, or right to terminate the lease, where the landlord at the time gives notice that he reserves his claim to possession under his notice to quit for nonpayment of rent. *Kimball v. Rowland* (1856) 6 Gray, 224.

In *Clayton D. Brown Co. v. O'Connor* (1912) — Tex. Civ. App. —, 151 S. W. 339, it was held that if an owner receives rent arising from the use of the roof by a lessee, this might operate as a waiver of the right to forfeiture by reason of the lessee's renting the roof, but it was held that the receipt of rent for storerooms only was not a waiver of the right to forfeiture for unlawful use, the payment having been accompanied with a protest that the roof was being unlawfully used.

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And it has been held that the acceptance on the 15th of the month of money due on a rent note payable on the first of the month will not preclude the maintenance of an action for possession on account of a failure to conduct a certain business on the premises, and other breaches, where it was expressly agreed at the time of payment that it should not interfere with the right to bring an action for possession. *Barrasso v. Tennessee Brewing Co.* (1911) 1 Tenn. C. C. A. 662.

In *Cochran v. Philadelphia Mortg. & T. Co.* (1903) 70 Neb. 100, 96 N. W. 1051, where a lessee who was in arrears for twelve months' rent mailed a check to the lessor sufficient to cover only a month's rent, accompanied by no letter of explanation, but marked on the back of the check to cover rent to a stated future date, which did not correspond with the date of the tenancy, it was held that there was no waiver of the breach by reason of the lessor's cashing such check and applying it to the rent in arrears, since he could not be presumed to know from the notation on the check the limitation which the lessee contemplated.

In connection with this subject, see *Granite Bldg. Corp. v. Greene*, under I. c.
J. T. W.

[HOUSE OF LORDS.]

JONES, *Appellant*,
and
JONES and Another, *Respondents*.

[1916] 2 A. C. 481.

Also Reported in 85 L. J. K. B. N. S. 1519, 115 L. T. N. S. 432, 32 Times L. R. 705, 61 Sol. Jo. 8.

Slander — Cause of action — Words imputing moral misconduct — Schoolmaster — Absence of special damage — Words not spoken of plaintiff in relation to his calling.

An action of slander will not lie for words imputing adultery to a schoolmaster, in the absence of proof of special damage, unless the words are spoken of him touching or in the way of his calling.

Tyre v. Creven (1834) 2 Ad. & El. 2, 111 Eng. Reprint, 1, 4 Nev. & M. 220, 4 L. J. K. B. N. S. 35. applied.

Dictum of Bayley, B., in *Lumby v. Allday* (1831) 1 Crompt. & J. 301, 305, 148 Eng. Reprint, 1434, 1 Tyrw. 217, 9 L. J. Exch. 62, explained.

Decision of the Court of Appeal [1916] 1 K. B. 351, affirmed.

(July 28, 1916.)

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Present: Viscount Haldane, Lord Sumner, Lord Parmoor, and Lord Wrenbury.

APPEAL from an order of the Court of Appeal setting aside a verdict and judgment in favor of the plaintiff in an action of slander tried before Lush, J., and a common jury, and ordering judgment to be entered for the defendants.

The plaintiff (the appellant) was a certificated teacher and was headmaster of the Llidiardau Council School, Rhoshirwaen, Pwllheli, in the county of Carnarvon. The slander complained of was that one day in May, 1914, the female defendant, who was the wife of the male defendant (they being the respondents), falsely and maliciously spoke and published of and concerning the plaintiff in relation to his profession as certificated teacher and in relation to his office as headmaster of the said school words imputing that the plaintiff had been guilty of adultery with one Mrs. Roberts, a married woman, who was employed by the cleaner of the school.

The defendants by their defense said that the alleged words, if-spoken (which was denied), did not relate to the plaintiff in his profession as certificated teacher, nor to him in his office as headmaster, and that such words were not actionable without proof of special damage, and none was alleged.

[482] The action was tried at the Carnarvon Assizes. At the trial Elizabeth Jones, one of the persons to whom the words complained of were spoken, was called as a witness, and in cross-examination she stated that the words were not spoken at all in reference to the plaintiff as schoolmaster. Before the plaintiff's case was closed his counsel proposed to call the secretary to the education committee which had control of the elementary schools in Carnarvonshire to prove that the slander in question would tend to lose the plaintiff his employment. Lush, J., asked if that was not obvious, and thereupon counsel for the defendants made the admission that the plaintiff would suffer to the same extent and no more than a man following any other occupation, and that a man who was a schoolmaster would probably be dismissed from his employment if he were leading an immoral life, just as a man following any other occupation would be. The exact language of this admission will be found in the judgment of Lord Sumner.

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The defendants adduced no evidence.

The questions left by the learned judge to the jury, with their answers thereto, were as follows:—

(1) Were words spoken by the defendants of the plaintiff imputing moral misconduct between plaintiff and Mrs. Ellen Roberts?—Yes.

(2) Were they spoken of him in the way of his calling, *i. e.*, in such a way as to imperil the retention of his office?—Yes.

(3) Did they impute that he was unfit to hold his office?—Yes.

And the jury fixed the damages at 10*l*.

The learned judge adjourned the case for further argument in London, and in the course of that argument counsel for the defendants again admitted that the county council would naturally not allow a master who was carrying on an immoral intercourse to stop in the school and teach children, but stated that this admission would be equally true of any other person occupying a public position. After hearing arguments on the law, Lush, J., entered judgment for the plaintiff in accordance with the verdict of the jury.

The Court of Appeal (Swinfen Eady, L.J., Warrington, L.J., and Bray, J.) set aside this judgment on the ground that words imputing adultery or immoral conduct, even when spoken of a man holding an office or carrying on a profession or business, were not actionable without special damage unless the words related to his conduct in [483] the office, profession, or business, or the imputation was connected with his professional duties, except in the case of a clergyman holding clerical preferment or employment, and that the imputation upon the plaintiff was not connected with his occupation or employment.

Sir Robert Finlay, K.C., and Mortimer Montgomery, K.C. (with them T. E. Morris and Arthur A. Thomas), for the appellant. The jury have found that the slander was spoken of the appellant in the way of his calling, and if there is any evidence fit to go to the jury, that is a question for them to decide. The cases in which an action for slander will lie without proof of special damage fall into three categories: (1) Where the words impute to the plaintiff a criminal offense; (2) where they impute

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to him that he is suffering from a contagious disease such as would exclude him from society; (3) where the words are spoken of the plaintiff in the way of his calling or office or tend to damage him in his calling or office. The true principle is that laid down by Bayley, B., in delivering the judgment of the Court of Exchequer in *Lumby v. Allday* (1831) 1 Crompt. & J. 301, 305, 148 Eng. Reprint, 1434, 1 Tyrw. 217, 9 L. J. Exch. 62, namely, that the words must impute the want of some general requisite, such as honesty, capacity, fidelity, etc., or must connect the imputation with the plaintiff's office, trade, or business. The words must impute to the plaintiff some special unfitness in relation to his calling, or the want of some general quality which must necessarily affect him in his calling. In the case of a schoolmaster a charge that he is carrying on an immoral intercourse with a married woman, if substantiated, must necessarily affect him in his calling. Apart from the Slander of Women Act 1891, to say that a young woman was unchaste was not actionable in the absence of special damage, but the contrary has been held in the case of a governess or domestic servant. *Quinn v. Wilson* (1850) 13 Ir. L. Rep. 381; *Connors v. Justice* (1862) 13 Ir. C. L. Rep. 451; and see *Rumsey v. Webb* (1842) 11 L. J. C. P. N. S. 129, Car. & M. 104. The profession of a schoolmaster involves training his pupils in sound moral principle as much as in reading and writing, and if an imputation of adultery is made against him, that is an imputation in the way of his profession, because it imputes [484] to him a want of morality, without which no man ought to be intrusted with the office of a schoolmaster. It is an imputation of the want of a general requisite for the office of a schoolmaster. It is not necessary that the words should be said of him in his profession or business; it is enough that the words are such as are calculated to damage him in his profession or business. The putting forward of any charge which if established would justify the plaintiff's dismissal from his office is actionable without special damage. The law was correctly applied by Lush, J. *Best v. Loit* (1637) 1 Rolle, Abr. 59 (case 6), shows that the words need not be spoken of the plaintiff in the way of his profession if they would disgrace him in his profession. The common law on this matter is to some extent inadequate and inconsistent,
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but it is not so wholly unreasonable as it would be if the view of the Court of Appeal were upheld. *Ayre v. Craven* (1834) 2 Ad. & El. 2, 111 Eng. Reprint, 1, 4 Nev. & M. 220, 4 L. J. K. B. N. S. 35, where a verbal charge of criminal conversation against a medical man was held not actionable *per se*, really proceeded upon a point of pleading, but so far as it went upon any general principle it was wrongly decided. It is doubted by Alderson, B., in *Gallwey v. Marshall* (1853) 9 Exch. 294, 156 Eng. Reprint, 126, 2 C. L. R. 399, 23 L. J. Exch. N. S. 78, 2 Week. Rep. 106, and by Parke, B., in *Jones v. Littler* (1841) 7 Mees. & W. 423, 151 Eng. Reprint, 831, 10 L. J. Exch. N. S. 171, though it was followed in *James v. Brook* (1846) 9 Q. B. 7, 115 Eng. Reprint, 1178, 16 L. J. Q. B. N. S. 17, 10 Jur. 541; *Parrat v. Carpenter* (1597) Cro. Eliz. pt. 2, p. 502, 78 Eng. Reprint, 752, where a verbal charge of adultery against a beneficed clergyman was held not actionable *per se*, is overruled by *Dod v. Robinson* (1647) Aleyn, 63, 82 Eng. Reprint, 917, as is stated by Parke, B., and Pollock, C. B., in *Gallwey v. Marshall*, *supra*, and is no longer law. In *Wharton v. Brook* (1669) 1 Ventr. 21, 86 Eng. Reprint, 15, Twisden, J., said that a charge of unchastity against a schoolmistress was not actionable without special damage, but that *dictum* cannot now be supported. A good reputation for morality is essential to the profession of a certificated teacher. *Hopwood v. Thorn* (1849) 8 C. B. 293, 137 Eng. Reprint, 522, 19 L. J. C. P. N. S. 94, 14 Jur. 87, which decided that a charge against a Methodist minister who was formerly a linen draper, that he was a dishonest draper, was not maintainable, was also wrongly decided. *Coxeter v. Parsons* (1698) 1 Ld. Raym. 423, 91 Eng. Reprint, 1181, went on a question of jurisdiction. *Gallwey v. Marshall*, *supra*, decided that no action would lie for a verbal imputation of incontinence in a clergyman unless he held some clerical office [485] or employment of temporal profit. Whether that decision is right or wrong, it is not opposed to the appellant's argument. In *Payne v. Beauwmorris* (1668) 1 Lév. 248, 83 Eng. Reprint, 391, words imputing to a chaplain that he had an illegitimate son were held actionable *per se*, and for this purpose the case of a chaplain or beneficed clergyman is identical with the case of a certificated teacher. It is settled that a verbal

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imputation upon the credit of a tradesman is actionable without special damage though not spoken of him in the way of his trade, since it must necessarily damage him in his trade. *Stanton v. Smith* (1727) 2 Ld. Raym. 1480, 92 Eng. Reprint, 462, approved in *Jones v. Littler*, *supra*. On the other hand, a verbal imputation against a solicitor of defrauding his creditors has been held not to be actionable *per se*. *Doyley v. Roberts* (1837) 3 Bing. N. C. 835, 132 Eng. Reprint, 632, 5 Scott, 40, 3 Hodges, 154, 6 L. J. C. P. N. S. 279. So, also, an imputation of insolvency. *Dauncey v. Holloway* [1901] 2 K. B. 441, 3 B. R. C. 54, 70 L. J. K. B. N. S. 695, 49 Week. Rep. 546, 84 L. T. N. S. 649, 17 Times L. R. 493. But it is startling to be told that an imputation of fraud or insolvency would not injure a solicitor in his profession. *Doyley v. Roberts*, *supra*, is, however, distinguishable from the present case, because there the jury found that the words were not spoken of the plaintiff as attorney; in *Dauncey v. Holloway*, *supra*, the question was withdrawn from the jury. In *Wood v. Barnett*, *The Times*, May 5, 1913, an action of slander for an imputation of drunkenness against a headmaster failed, but the charge was a stale one, and the jury found that the charge would not lead to the plaintiff's dismissal though it might damage his future career. So an action of slander for a charge of want of sincerity against a member of Parliament has been held not to be maintainable (*Onslow v. Horne* (1771) 2 W. Bl. 750, 753, 96 Eng. Reprint, 439, 3 Wils. 177); but the case might be different now that members receive a salary. De Grey, Ch. J., delivering the judgment of the Court of King's Bench, there states the general principle to be that words are actionable if they "may be of probable ill consequence to a person in a trade, a profession, or an office." It being here beyond question that the particular imputation damages the plaintiff in his profession, the law does not withhold a remedy.

[**Viscount Haldane:** In *Miller v. David* (1874) L. R. 9 C. P. 118, 125, 43 L. J. C. P. N. S. 84, 30 L. T. N. S. 58, 22 Week. Rep. 332, Lord Coleridge, delivering the judgment of the court, says that the rule laid down by [486] De Grey, Ch. J., is expressly disapproved of by the Court of Exchequer in *Lumby v. Allday* (1831) 1 Crompt. & J. 305, 148 Eng. Reprint, 1436, 1 Tyrw. 217, 9 L. J. Exch. 62.]

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In *Miller v. David* (1842) L. R. 9 C. P. 118, 43 L. J. C. P. N. S. 84, 30 L. T. N. S. 58, 22 Week. Rep. 332, it is manifest that the words were not defamatory and were not spoken of the man in his trade. In *Alexander v. Jenkins* [1892] 1 Q. B. 797, 61 L. J. Q. B. N. S. 634, 66 L. T. N. S. 391, 40 Week. Rep. 546, 56 J. P. 452, Lord Herschell, in dealing with an imputation of the want of some general requisite, proceeded on the distinction between an office of profit and an office of credit and honor, and held that in the latter case a mere general imputation of the want of some general quality was not *per se* actionable. In several early cases words imputing the want of some general requisite for a trade or profession have been held actionable *per se*. *Taylor v. Perr* (1616) 1 Rolle, Abr. 44 (case 5), 55 (case 21); *Blunden v. Eustace* (1618) Cro. Jac. 504 (case 15), 79 Eng. Reprint, 430; *Cawdry v. Highley* (1633) Cro. Car. 270 (case 5), 79 Eng. Reprint, 835, *sub nom.* *Cawdrey v. Chickley*, 1 Rolle Abr. 54 (case 11); *Seaman v. Bigg* (1637) Cro. Car. 480 (case 3), 79 Eng. Reprint, 1015; *Read v. Hudson* (1700) 1 Ld. Raym. 610, 91 Eng. Reprint, 1308.

The cardinal defect of the judgment of the Court of Appeal is that it treats the case of a charge of insolvency against a tradesman, of which the last-cited case is an example, as one of an exceptional character, whereas it is in fact an illustration of the general principle laid down by Bayley, B., that words imputing the want of some general quality the possession of which is essential to success in the calling of the plaintiff are *per se* actionable.

Greer, K.C. (with him **T. Artemus Jones and Clement Davies**), for the respondents.

[**Viscount Haldane:** We wish to hear you on the question whether the second and third questions should have been submitted to the jury at all.]

As to those questions there was no evidence fit to go to the jury. The admission of the respondents' counsel carried the matter no further. There is no decided case, except in the case of the insolvency of a trader, where a statement of a want of a general requisite has been held a sufficient foundation for an action of slander unless the words are spoken in relation to the plaintiff's particular calling. The authorities are all consistent with the

view that a verbal imputation on the plaintiff's moral character not connected by the speaker [487] expressly or by implication with the plaintiff's business or profession is not actionable in the absence of proof of special damage. That is true not only of sexual immorality, but of dishonesty. Bayley, B's *dictum* has been misunderstood. *Hartley v. Herring* (1799) 8 T. R. 130, 101 Eng. Reprint, 1305, 4 Revised Rep. 614, where immorality was imputed to a dissenting minister, went upon the question whether special damage was alleged with sufficient certainty, but upon the appellant's contention that question would have been irrelevant. *Stanton v. Smith* (1727) 2 Ld. Raym. 1480, 92 Eng. Reprint, 462, is one of those exceptional cases as to insolvency, but if insolvency is imputed to a trader, that necessarily refers to insolvency in his trade. In *Jones v. Littler* (1841) 7 Mees. & W. 423, 151 Eng. Reprint, 831, Parke, B., shows the *ratio decidendi* of the insolvency cases. In *Brayne v. Cooper* (1839) 5 Mees. & W. 249, 151 Eng. Reprint, 106, 9 L. J. Exch. N. S. 80, an allegation that a staymaker made his living by the proceeds of prostitution was held not actionable. *Smedly v. Heath* (1668) 1 Lev. 250, 83 Eng. Reprint, 392, shows that an allegation of dishonesty against a tradesman does not give a cause of action unless spoken in relation to his trade. So, in *Hopwood v. Thorn* (1849) 8 C. B. 293, 137 Eng. Reprint, 522, 19 L. J. C. P. N. S. 94, 14 Jur. 87, it was held that an allegation of dishonesty against a clergyman was not actionable unless the speaker connected the dishonesty with the plaintiff's profession. This case is governed by the principle of *Ayre v. Craven* (1834) 2 Ad. & El. 2, 111 Eng. Reprint, 1, 4 Nev. & M. 220, 4 L. J. K. B. N. S. 35, which was followed in *Dixon v. Smith* (1860) 5 Hurlst. & N. 450, 157 Eng. Reprint, 1257, 29 L. J. Exch. N. S. 125.

[He was stopped.]

Sir Robert Finlay, K.C., in reply. The respondents' proposition is displaced by Parke, B., in *Jones v. Littler* (1841) 7 Mees. & W. 423, 151 Eng. Reprint, 831, and by *Drake v. Hill* (1669) T. Raym. 184, 83 Eng. Reprint, 97; *Stanton v. Smith*, *supra*; *Cawdry v. Highley* (1633) Cro. Car. 270, 79 Eng. Reprint, 835 (case 5), and *Best v. Loit* (1637) Rolle, Abr. 59 (case 6). "Whether the words were spoken of the plaintiff in the way

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of his office, profession, or trade is a question for the jury" (Odgers on Libel and Slander, 5th ed. p. 685); and this question was left to the jury in *Jones v. Littler*, *supra*, and in *Doyley v. Roberts* (1837) 3 Bing. N. C. 835, 132 Eng. Reprint, 632.

The House took time for consideration.

Viscount Haldane: My Lords, the question in this appeal is whether the appellant, who was plaintiff in the action, [488] can recover general damages for an untrue verbal imputation of immoral conduct with a married woman. He is a certificated teacher and is the senior master of a council school in Wales. It is not in dispute that the imputation of such conduct, if believed, would be seriously prejudicial to a person in his position, and might lead to the loss of an appointment which, concerned as it is with the teaching of the young, implies in the person who holds it freedom from reproach of this kind. At the same time it must be remembered that the position of a certificated teacher is not unique in this respect, for there are many other appointments that are held on a similar condition, express or implied.

The school in which the appellant was employed was looked after by his aunt, as caretaker, and she was in the habit of employing the husband of a Mrs. Ellen Roberts to do some of the cleaning. The respondent, Mrs. Jones, is found by the jury before which the action was tried to have spoken words imputing moral misconduct between the appellant and Mrs. Roberts. Mrs. Jones was the defendant in the action, and her husband was joined as being liable for his wife's tort. The jury found further, in response to questions from Lush, J., who tried the case, that the words "were spoken of him in the way of his calling, that is, in such a way as to imperil the retention of his office," and further that "the words imputed that he was unfit to hold his office." It is, however, clear that there was no evidence that any words were used which referred to his office or his conduct in it, and the first part of the finding cannot be relied on as anything more than an inference. Nor was there any evidence of the use of words which could, by the terms used, bear out the second part of the finding. It was, moreover, not alleged that the appellant

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had been dismissed or otherwise pecuniarily injured in his calling, and indeed there was no evidence whatever of special damage. The jury, however, assessed general damages at 10*l*. Upon these findings Lush, J., reserved the question of law, whether the appellant was entitled to judgment, and afterwards, having heard arguments, delivered a considered opinion, as the result of which, after examining the authorities, he decided for the appellant. In the course of the argument before him, counsel for the present respondents admitted that the local educational authority would naturally not allow a teacher to remain in the school and teach [489] children if he were carrying on an immoral intercourse. But he said that his admission was meant to have nothing in it distinctive of the office of a teacher, and that he admitted only what would apply equally in the cases of other offices.

The Court of Appeal reversed the judgment of Lush, J., and entered judgment for the respondents.

After examining the authorities, I have come to the conclusion that the Court of Appeal were right, and that the judgment of Lush, J., notwithstanding the care which he had obviously bestowed on it, cannot be supported. He seems to have regarded the decided cases as having laid down a broad principle, which could be legitimately extended to a case like the present. My Lords, I think that is not so. The action for slander has been evolved by the courts of common law in a fashion different from that which obtains elsewhere. As one of the consequences the scope of the remedy is, in an unusual degree confined by exactness of precedent. It is not for reasons of mere timidity that the courts have shown themselves indisposed to widen that scope, nor do I think your Lordships are free to regard the question in this case as one in which a clear principle may be freely extended. Lord Herschell, in his judgment in *Alexander v. Jenkins* [1892] 1 Q. B. 797, 801, remarked of this very point that "when you are dealing with some legal decisions which all rest on a certain principle, you may extend the area of those decisions to meet cases which fall within the same principle; but where we are dealing with such an artificial law as this law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say that if the action is to be extended to a class of cases in which it has

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not hitherto been held to lie, it is the legislature that must make the extension, and not the court." There is a difference between slander and libel which has been established by the authorities, and which is not the less real and far-reaching because of the fact that it is explicable almost exclusively by the different histories of the remedies for two wrongs that are in other respects analogous in their characters. The greater importance and scope of the action for libel was mainly attributable to the appearance of the printing press. The Court of Star Chamber quickly took special cognizance of libel, regarding it not merely as a crime punishable as such, but as [490] a wrong carrying the penalty of general damages. After the Star Chamber was abolished by the Long Parliament, much of the jurisdiction which its decisions had established and developed in cases of libel survived, and was carried on by the courts of common law to whom it passed.

The history of the action for slander is radically different. Slander never became punishable in the civil courts as a crime. In early days the old local courts took cognizance of it as giving rise to claims for compensation. When these courts decayed, the entire jurisdiction in cases of defamation appears to have passed, not to the courts of the King, but, at first at all events, to the courts of the Church. However, after the Statute of Westminster the Second had enabled novel writs *in consimili casu* to be issued, the action on the case for spoken words began to appear as one which the courts of the King might entertain. Subsequently to the Reformation, when the authority of the courts of the Church received a heavy blow and began to wane, the courts of the King commenced the full assertion of a jurisdiction in claims arising out of spoken defamation concurrent with that of the spiritual tribunals. As might have been expected of civil courts, whose concern had been primarily with material rights, and not with discipline as such, the new jurisdiction in claims based on slander appears to have been directed to the ascertainment of actual damage suffered and to a remedy limited to such damage. This explains the restricted character of the development of the remedy and the tendency to confine its scope by the assertion that actual damage was the gist of the action. The observations of Pollock, C.B., in the course of his judgment in *Gallwey v. 10 B. R. C.*

Marshall (1853) 9 Exch. 294, 156 Eng. Reprint, 126, 2 C. L. R. 399, 23 L. J. Exch. N. S. 78, 2 Week. Rep. 106, illustrate the importance of these considerations. The rule thus established was to some extent relaxed in its form by decisions which in certain nominate cases treated particular types of slander as so injurious by their very nature that the suffering of actual damage might be presumed, and need not be proved. These exceptional types of slander comprised imputations of the commission of serious criminal offenses, imputations of suffering from certain noxious diseases, and imputations of special forms of misconduct which would manifestly prejudice a man in his calling. But, as a general principle, as to the actionable character of [491] words spoken of a man to his disparagement in his calling, the courts, with an exception to which I will refer later, appear on the balance of authority to have laid down the limitation that the words must have been actually spoken of him "touching" or "in the way" of that calling. In *Lumby v. Allday* (1831) 1 Crompt. & J. 301, 305, 148 Eng. Reprint, 1434, Bayley, B., said: "Every authority which I have been able to find either shows the want of some general requisite, as honesty, capacity, fidelity, etc., or connects the imputation with the plaintiff's office, trade, or business." In speaking of the imputation of such a want of "general requisite" as actionable in itself, I think that Bayley, B., was referring to certain decisions which show that, in the case of a trader, the courts construed language which might affect his credit to be presumed to be directed against his credit as a trader, although no express "colloquium" touching his trade had been proved. The courts which leaned specially to the protection of traders appear to have made this presumption almost, if not quite, as matter of law for the security of commerce. But Bayley, B., observed that the words must be such as to have "a natural" as distinguished from a merely probable tendency to damage the plaintiff's reputation in his calling. In *Jones v. Littler* (1841) 7 Mees. & W. 423, 426, 151 Eng. Reprint, 831, Parke, B., laid down this exception to much the same effect. A brewer was alleged to have been locked up for debt. It was found that in the "colloquium" he had been referred to as a brewer. But Parke, B., said that "even if" the words "were spoken of him
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in his private character, I think the case of *Stanton v. Smith* (1727) 2 Ld. Raym. 1480, 92 Eng. Reprint, 462, is an authority to show that the words would have been actionable, because they must necessarily affect him in his trade." The older case of *Reeve v. Holgate* (1671) 2 Lev. 62, 83 Eng. Reprint, 450, lays down the rule similarly. But it proceeds on the ground that the words themselves supply the "colloquium," for "they appear to be spoke of his trade." This readiness to make a presumption, as regards language which might affect the credit of a trader, of damage arising from words alleging insolvency, notwithstanding that the imputation is not in terms made about him in his capacity of trader, has not been extended to other callings. There is indeed at least one other illustration of such readiness disclosed by the books, in the case of a clergyman who holds a benefice or an ecclesiastical position of temporal profit [492] which may, by the very terms on which it is held, be put in peril of forfeiture by the slander. But this is an exception which has no application, notwithstanding peril of injury to his reputation in his calling, if the clergyman does not hold his benefice or position actually on these terms. Subject to the carefully guarded exceptions to which I have referred, the rule is that laid down in Comyns' Digest, "Action upon the Case for Defamation" (D. 27): "But words not actionable in themselves are not actionable when spoken of one in an office, profession, or trade, unless they touch him in his office, etc." In *Doyley v. Roberts* (1837) 3 Bing. N. C. 835, 132 Eng. Reprint, 632, 5 Scott, 40, 3 Hodges, 154, 6 L. J. C. P. N. S. 279, Tindal, Ch. J., applied the law as laid down in this passage by refusing relief to an attorney of whom it was falsely said that he had defrauded his creditors and been horsewhipped off the course at Doncaster. That this is the basic principle which limits the cases in which the common law permits general damages to be awarded was laid down in striking language in the judgment of the Court of King's Bench in *Ayre v. Craven* (1834) 2 Ad. & El. 2, 7, 111 Eng. Reprint, 1, delivered by Lord Denman, Ch. J. "Some of the cases," he said, "have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery; and a schoolmistress having been declared incompetent to main-
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tain an action for a charge of prostitution. Such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but not being applicable to their conduct therein, no action lay." There a physician had been accused of adultery, but the words did not in terms connect the imputation with anything done by him when acting in a professional capacity. This decision was followed in *James v. Brook* (1846) 9 Q. B. 7, 14, 115 Eng. Reprint, 1178, when it was said that "even if the words have a natural tendency to produce injury in the profession, the declaration is wholly wanting in any explanation of the way in which the speaker connected the conduct with the profession."

My Lords, I think that these authorities and others which were referred to in the arguments at the bar have settled the law too firmly to admit of our extending the exceptions which have been made further than the decided cases go. I agree with what was said by Lord Herschell in the judgment in *Alexander v. Jenkins* [1892] 1 Q. B. 797, 61 L. J. Q. B. N. S. 634, 66 L. T. N. S. 391, 40 Week. Rep. 546, 56 J. P. 452, which I have already quoted, and with the carefully guarded judgment [493] of Swinfen Eady, L.J., in the present case. If we were to admit that an action for slander can lie in the case of a schoolmaster who has not proved either that the words were spoken of him "touching or in the way of his calling," or that he has suffered the actual damage which is the historical foundation of the action, and is even now its normal requisite, I think we should be overruling *Ayre v. Craven* (1834) 2 Ad. & El. 2, 111 Eng. Reprint, 1, 4 Nev. & M. 220, 4 L. J. K. B. N. S. 35, and other decisions of great authority, and should be doing what only the legislature can do to-day. It required an act of Parliament, the Slander of Women Act 1891, to enable a woman to recover general damages for an imputation of unchastity. In my opinion it would require an analogous act to enable the present appellant to recover such damages for an imputation of adultery which was not obviously directed to his reputation as a schoolmaster. I am therefore of opinion that we have no option to do anything but dismiss this appeal, with costs.

Lord Sumner: My Lords, the facts of this case are of a
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familiar kind. The appellant, Mr. David Jones, is headmaster of the Llidiardau Council School, Rhoshirwaen, Pwllheli. He is an unmarried man and lives with his aunt. In May, 1914, Ellen Jones, who is a farmer's wife, told Elizabeth Jones, and, as was alleged, Eliza Griffiths too, that Mr. David Jones had committed adultery with Ellen Roberts. What is more, she added that Ellen Roberts herself had told her so. This came to the appellant's ears, and no doubt not to his alone, and he sued Ellen Jones and her husband for slander. A Carnarvon common jury awarded him 10*l.*, which seems to show that they thought it an ordinary matter, but it is only fair to him to say that the defendants did not venture to support the charge, and for their part had no merits whatever. Is it accordingly just the sort of case in which a contention fundamentally challenging long-settled law would be brought before your Lordships.

Lush, J., at the trial, put to the jury, with other questions, these two: "Were they (the words charged) spoken of him (the plaintiff) in the way of his calling, *i. e.*, in such a way as to imperil the retention of his office?" and "Did they impute that he was unfit to hold his office?" The jury said "Yes" to both. Evidence of the suggested tendency to affect the plaintiff in his office was not called, an [494] admission having been made by counsel for the defendants. Of this admission two versions exist. The difference in form is slight, and no difference in substance was intended, but I think that the one actually made before verdict, in the hearing of the jury, is the one that should prevail. The substance of it, according to the shorthand note, is:—

"Lush, J.: 'Can you suggest, Mr. Artemus Jones, that if a schoolmaster, in a place like this, is found misconducting himself with a married woman, he is not likely to suffer in his employment?'

"Mr. Artemus Jones (for the defendants): 'I submit that he would suffer no more than a man following any other occupation, and I submit again that in order to get this evidence in, the foundation stone must be laid,—that the words were spoken of him in the way of his profession.'

"Lush, J.: 'But you don't want evidence to show that he would not be kept in his employment if he misconducted himself in
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this way, but it does not follow that the words were spoken of him in the way of his profession.'

"Mr. Montgomery (for the plaintiff): 'This is a fact upon which evidence ought to be given.'

"Lush, J.: 'Then you may take it that it would be injurious.' "

The words of the slander itself made no allusion to the appellant's calling at all, and Elizabeth Jones, to whom they were spoken, when asked in cross-examination, "The words were spoken to you not in reference to his position as a schoolmaster at all?" said, "Not at all." As for Eliza Griffiths, she failed even to prove publication. I therefore agree with the judgment of the Court of Appeal that "there was no evidence to leave to the jury on the first part of question 2, namely, 'whether the words were spoken of the plaintiff in the way of his calling,' " and counsel's admission was merely that such words would be of an injurious tendency in the case of most men, including the plaintiff. The question, therefore, comes to be this: "In the absence of proof of special damage, of which none was given, is an imputation of adultery made against a man, who is in fact a schoolmaster but is not spoken of as such, a matter which is actionable *per se*?"

My Lords, I think it was recognized in the appellant's argument that such an imputation does not necessarily and always do harm. The form in which the appellant's proposition was eventually [495] advanced was that words are actionable *per se* the natural consequence of which in ordinary circumstances would be to injure the person of whom they are spoken, or, alternatively, that words which impute to one who follows a particular calling the want of a general requisite for persons in that calling are, as a natural consequence, damaging to them, and are therefore actionable without proof of special damage.

On this contention the following observations arise at the outset. If words spoken of a person following a particular calling are actionable *per se*, when they impute the want of a general requisite for that calling, how came it that a statute was required in 1891 to enable a woman to sue for an imputation of unchastity, whether she was in employment or not, in the absence of proof of special damage? A reputation for chastity was cer-
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tainly a general requisite for many of the employments of women before 1891, and, considering that judges have not been unfriendly to such plaintiffs, I think it would have been held to be generally requisite in almost all, if such a conclusion would have done the victim of the slander any good. Nevertheless the act had to be passed, because without it no woman had a remedy for spoken charges of unchastity, unless they were either spoken of her in the way of her calling or were followed by provable damage.

Next, how comes it that several generations of pleaders, in days when pleadings followed the law and often were its best expression, always averred that slanders were spoken "of and concerning the plaintiff in his profession or calling," stating it? Nobody ever pleaded that the plaintiff's calling was this or that, and the defendant spoke and published of him the words following, meaning thereby that he was lacking in some quality generally requisite in his said calling; yet such an averment, if good, would have helped many a lame case over the stile. Nobody ever tried to demur to the averment that the words were spoken of and concerning the plaintiff in his profession or calling. On the contrary, such an averment was expressly held to be proper and necessary. *James v. Brook* (1846) 9 Q. B. 7, 115 Eng. Reprint, 1178, 16 L. J. Q. B. N. S. 17, 10 Jur. 541.

Thirdly, except in the case of slanders imputing incontinence to beneficed clergymen of the Church of England, and slanders imputing insolvency to persons who in fact are tradesmen (which last is [496] probably not a real exception), no plaintiff, at least since the time of Comyns' Digest, has ever recovered damages for a spoken imputation of incontinence, unless he either showed that the words were spoken of him in his calling or proved actual damage. Earlier cases, so far as they seem to be to the contrary, can, I think, be accounted for. They are often badly or too briefly reported; they are often cases in which, after verdict, the necessary allegation and proof that the words were spoken of and touched the plaintiff in his calling were presumed as a matter of course. How is this blank in the authorities to be explained, if the appellant's proposition be sound? For three centuries the courts have been dealing with such imputations. They are, and long have been,—such is the weakness of our nature—a favorite weapon in
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the armory of controversialists, male and female, in private life, and mankind has so often acted on the proverb that "hard words break no bones," that special damage has rarely been proved to have occurred. My Lords, before these considerations can be answered, it must be shown that the law has long been grievously misunderstood, and that requires cogent proof indeed.

My Lords, I will not cite at length the case of *Ayre v. Craven* (1834) 2 Ad. & El. 2, 111 Eng. Reprint, 1, 4 Nev. & M. 220; I will only observe that, according to the report in the *Law Journal*, 4 L. J. K. B. N. S. 35, the plaintiff was an ordinary doctor at Hull, and so did not belong to that class of medical practitioners, which the appellant's counsel postulated but never defined, for whose professional well-being a reputation, at least, for continence was said not to be a general requisite. Instead I will refer to three cases long ago decided, and never, so far as I know, authoritatively impugned. In *Doyley v. Roberts*, 3 Bing. N. C. 835, 840, 132 Eng. Reprint, 632, in 1837, the jury found, first, that the words were not spoken of the plaintiff in his business as an attorney; but, second, that the words had a tendency to injure him professionally. It was held in banc that this was a verdict for the defendant. As Vaughan, J., said: "When the jury found that these words were not spoken of the plaintiff in his character of attorney, they took the sting out of the imputation;" and the passage from Comyns' Digest was cited with approval, which says: "Words not actionable in themselves are not actionable when spoken of [497] one in an office, profession, or trade, unless they touch him in his office."

Ten years afterwards, in *Pemberton v. Colls* (1847) 10 Q. B. 461, 468, 116 Eng. Reprint, 176, the Court of Queen's Bench had before it the following proposition from Starkie on Slander: "Where a person holds an office or situation, in which great trust and confidence must be reposed in him, words which impeach his integrity generally, though they contain no express reference to his office, are actionable; since they must necessarily attach to him in his particular character, and virtually represent him as unfit to hold that office or situation." In a considered judgment the court rejected it. I think that virtually this is the very proposition which is before your Lordships to-day.

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In delivering the judgment of the Court of Exchequer in *Foulger v. Newcomb*, L. R. 2 Exch. 327, 330, in 1867, Channell, B., says: "One essential ingredient of a good cause of action for defamation is damage. The rules . . . as to the cases in which such damage is implied by law are somewhat arbitrary; but the more important principles of them are now clearly defined. . . . First, that from spoken words which impute misconduct in an office, trade, profession, or business, the law implies actionable damage. Secondly, that . . . they are actionable if they are shown actually to cause (as their legal and natural consequence) damage of a character which the law will recognize. In order that the rule as to slander of a man in his business may apply, it is necessary that the words (being capable of having reference to his business) should in fact be spoken of him in respect of his business. . . . Next, it must appear that they tend to prejudice him in that business."

My Lords, Lush, J., in the judgment which the appellant supports, disputes the necessity thus alleged by Channell, B. "I have come to the conclusion," he says, "that in certain cases, depending on the circumstances of the case, it is not necessary, in order to maintain an action, for the plaintiff to establish that the speaker did impute to the person defamed that he was guilty of some misconduct in the course of discharging the duties of his office. . . . I think the expression 'in relation to his calling,' does not refer to the words used by the speaker. . . . In my opinion the meaning of that expression is this, that if the plaintiff cannot prove special damage, [498] he must prove that the words were spoken of him in such a way and with such consequence, having regard to his calling, . . . that the words spoken would necessarily affect him in the following of that calling."

It was in the last words of this proposition that the appellant's counsel, at your Lordships' bar, preferred to substitute for "necessarily" the words "as a natural consequence," or words to that effect. The learned judge relied on a class of cases in which it has been held that words imputing want of credit or insolvency to a person who, in fact, is a tradesman, are actionable *per se*, even though the speaker has not, by his words or otherwise, shown that the imputation is made upon the plaintiff in his trade. *Best*

v. Loit (1637) 1 Rolle Abr. 59 (case 6), is an early instance. Others are *Stanton v. Smith* (1727) 2 Ld. Raym. 1480, 92 Eng. Reprint, 462, and *Whittington v. Gladwin* (1826) 5 Barn. & C. 180, 108 Eng. Reprint, 67, 4 Nev. & M. 220, 4 L. J. K. B. N. S. 35. It is unnecessary to examine such cases in detail, for the reason for them is this, as given by Parke, B., in *Jones v. Littler* (1841) 7 Mees. & W. 423, 426, 151 Eng. Reprint, 831: "Here the imputation is that of insolvency, which must be injurious; for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be injured." The explanation is thus peculiar to the case of tradesmen. The rule appears to be one going rather to the construction of the words used, and laying down that mention of want of credit implies *prima facie* a reference to some trade involving credit, than one going to the question whether words can be actionable *per se* except words imputing crime or certain diseases, or actually touching the party defamed in his trade. In any case, it has not been carried beyond cases of tradesmen, nor could it be said here that the imputation was one which must necessarily have been injurious to a school-master. On the contrary, to use Parke, B.'s observation on *Ayre v. Craven* (1834) 2 Ad. & El. 2, 111 Eng. Reprint, 1, 4 Nev. & M. 220, 4 L. J. K. B. N. S. 35, and *Doyley v. Roberts* (1837) 3 Bing. N. C. 835, 132 Eng. Reprint, 632, 5 Scott, 40, 3 Hodges, 154, 6 L. J. C. P. N. S. 279, "it was possible that such imputations of incorrect conduct, out of the line of their respective professions, might not injure their professional characters."

I think that, apart from this line of cases about tradesmen, Lush, J., founded himself on a misreading of the often-quoted expression of [499] Bayley, B., in *Lumby v. Allday* (1831) 1 Crompt. & J. 301, 305, 148 Eng. Reprint, 1434—"either shows the want of some general requisite, as honesty, capacity, fidelity, etc., or connects the imputation with the plaintiff's office, trade, or business." He treated this sentence as laying down two criteria of slanders actionable *per se*, either of which would suffice, as if words connecting the imputation with the plaintiff's office stood in contradistinction to words which did not so connect it with his office, but merely imputed to him the want of something which

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would be generally requisite for such office. This sentence, however, only purports to summarize the authorities, and in the sense in which it was understood by Lush, J., the authorities do not bear it out. Furthermore, the general requisites of which it speaks are qualities at large, whether moral or intellectual, and such qualities only become requisites when they are requisite for something else. Fidelity, for example, is a requisite of an employment of trust. Capacity implies such kind of capacity as the particular occupation requires. Thus the first part of the sentence, like the second, involves a reference to the plaintiff's calling; it opposes an imputation of the want of some general requisite for that calling to particular imputations on his conduct in that calling. I agree with the passage in the judgment of the Court of Appeal [1916] 1 K. B. 351, 360: "In our opinion, words imputing adultery, profligacy, immoral conduct, or the like, whether referring to behavior on a particular occasion or to conduct in general, even when spoken of a man holding an office or carrying on a profession or business, are not actionable without special damage unless they relate to his conduct in the office, profession, or business, or the imputation is connected with his professional duties."

My Lords, it has often been said that the right to sue for words spoken, when no damage can be proved, ought not to be extended. As Martin, B., observes in *Allsop v. Allsop* (1860) 29 L. J. Exch. N. S. 315, 317: "The law is jealous of actions for mere words, and the rules limiting these actions ought to be adhered to here." I am sure that no one who has had even a short experience of the business of an ordinary civil assize would question the wisdom of this caution. If a change of the law is desired, it is from the legislature, as it was in 1891, that relief must be sought. It could be simply obtained either by enacting that [500] a schoolmaster, etc., should be deemed to be a woman within 54 & 55 Vict. chap. 51, § 1, or that, for the purposes of actions of slander, imputations of incontinence in a man should be deemed to be imputations of a criminal offense, punishable by imprisonment. In the first case, as to costs (no unimportant matter in these cases), a man's position would be equal, and in the latter superior, to a woman's.

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My Lords, this part of the law of slander has sometimes come in for pretty sharp criticism, particularly from the judges who have applied it. The Court of Appeal in the present case says ([1916 1 K. B. 358]): "The law of slander is an artificial law. . . . It is not like a law founded on settled principles, where the court applies established principles to new cases, as they arise." I think this does the common law on the subject less than justice. The law of defamation is founded on settled principles. Defamation, spoken or written, is always actionable if damage is proved, and, even if it is not, the law will infer the damage needed to found the action (1) when the words are written or printed; (2) when the words spoken impute a crime punishable with imprisonment; (3) when they impute certain diseases naturally excluding the patient from social intercourse; (4) when words are spoken of a person following a calling, and spoken of him in that calling, which impute to him unfitness for or misconduct in that calling. The classification is one of words, not of persons, but it is a classification only. There is no reason why all four classes of words should be held to import legal damage for the same or for some analogous reason. I think these rules are as well established, as worthy of being called principles, and as capable of being applied to new cases when they arise, as are most rules or principles of law or equity. Perhaps they are neither ideally just nor ideally logical, but principles are like that. For myself I am quite content to take the law as I find it.

My Lords, I think that the appeal should be dismissed, with costs.

Lord Parmoor: My Lords, the appellant is a schoolmaster, appointed to that office by the Carnarvonshire County Council. The female respondent spoke words imputing to him moral misconduct with a married woman. There was no proof of damage and [501] no imputation of misconduct in the discharge by the appellant of his office as teacher. The words were spoken of him in his private character. The jury found that the words were spoken of the appellant in such a way as to imperil the retention of his office. It was proposed at the trial to call Mr. Evan R. Davies to give evidence on the question whether the alleged slan-

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der would tend to lose the appellant his employment. The learned judge thought it was not necessary to call evidence on a matter which no one could doubt. Mr. Artemus Jones, counsel for the respondents, did not question this inference, but made it quite clear that in his opinion no action would lie unless the words were spoken of the appellant in the way of his profession, and that the words must be distinctive—that is to say, of such a character as would, in a special manner, be injurious to a teacher as distinguished from any other public officer. “The admission I made was that undoubtedly a public authority would remove him, just as I submit it would remove any other of its servants.” Without determining how far the question is one for the jury, or of inference by the judge, in this instance the judge and the jury took the same view, and I think the case must be considered on the basis that the words spoken were such as would necessarily imperil the continuance of the appellant in his office as teacher.

The principle that damage of some kind is essential to maintain an ordinary action of slander is not open to question. There are, however, certain cases in which the law assumes the probability of damage without requiring proof. It is not necessary that the damage should be pecuniary. This is illustrated in an action for words imputing that the plaintiff is suffering from certain forms of contagious disease, which tend to ostracize him from society. In this case the law will assume damage without requiring proof, as also in cases in which a criminal offense is imputed to the plaintiff, or in which the words spoken impute to the plaintiff misconduct, or want of skill or capacity, in the duties or requirements of his office, profession, or trade. There is a further case of much difficulty, where the words on which the action is founded are spoken of the plaintiff in his private character, but impute to him the want of some quality or capacity requisite to render him a fit person to hold the office in which he is, or to pursue the profession or vocation in which he is engaged. The most common instance is that of words [502] which impute dishonesty to a trader, in which case the law assumes damage without requiring proof. The question in debate is whether words spoken, which impute to a teacher moral misconduct with a married woman, are actionable *per se* upon probability of damage,
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and come within the category of those cases in which the law assumes damage without requiring proof.

The principle above referred to is illustrated in three cases to which reference was made during the argument before your Lordships. In *Lumby v. Allday* (1831) 1 Crompt. & J. 301, 305, 148 Eng. Reprint, 1434, Bayley, B., who delivered the judgment of the court, said: "Every authority which I have been able to find either shows the want of some general requisite, as honesty, capacity, fidelity, etc., or connects the imputation with the plaintiff's office, trade, or business." This passage does not purport to say that whenever words import the want of some general requisite they are actionable without proof of damage, but that they are not actionable unless they comply with one or other of the two conditions.

In *Jones v. Littler* (1841) 7 Mees. & W. 423, 151 Eng. Reprint, 831, Parke, B., says: "The learned judge did leave the question to the jury, whether the words were spoken of the plaintiff in his trade; and, indeed, it is plain that the words were so used, from the fact that, in the conversation in question, the plaintiff was spoken of as a brewer. Independently of that, however, and even if they were spoken of him in his private character, I think the case of *Stanton v. Smith* (1727) 2 Ld. Raym. 1480, 92 Eng. Reprint, 462, is an authority to show that the words would have been actionable, because they must necessarily affect him in his trade. It is there said: 'We were all of opinion that such words spoken of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and therefore that they were actionable.'"

Parke, B., then distinguishes the case he is considering from *Ayre v. Craven* (1834) 2 Ad. & El. 2, 111 Eng. Reprint, 1, and *Doyley v. Roberts* (1837) 3 Bing. N. C. 835, 132 Eng. Reprint, 632, on the ground that "it was possible that such imputations of incorrect conduct, out of the line of their respective professions, might not injure their professional characters. But this case is distinguishable, because here the imputation is that of insolvency, which must be injurious; for if a [503] tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must, be in-

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jured. The case of *Stanton v. Smith*, *supra*, as it appears to me, is good law, notwithstanding the observations of Coltman, J., in *Doyley v. Roberts*, *supra*."

Parke, B., does not say that he would have come to the same conclusion as Lord Denman in *Ayre v. Craven*, *supra*, and in *Gallwey v. Marshall* (1853) 9 Exch. 294, 297, 156 Eng. Reprint, 126, Alderson, B., said: "There are certain professions, the proper exercise of which depends on morality; and except for the case of *Ayre v. Craven*, *supra*, I should have thought that that of a physician is one of them."

In *Alexander v. Jenkins* [1892] 1 Q. B. 797, 800, Lord Herschell said that with regard to a man's business, profession, or any office of profit, the words spoken, to be actionable *per se*, "must be either something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would show that he is a man who, by reason of his want of ability or honesty, is unfit to hold the office. So much with regard to offices of profit; the reason being that in all those cases the court will presume, or perhaps I should rather say the law presumes, such a probability of pecuniary loss from such imputation, in that office or employment or profession, that it will not require special damage to be shown. It may be said to be an arbitrary rule. Be it so; but the rule is, at all events, laid down, and seems to me to rest on that basis."

Sir Robert Finlay, in his exhaustive review of all the relevant cases, did not bring any to the notice of your Lordships in which an imputation on a plaintiff's moral character in his private life had been held to be actionable without proof of damage, except the case of a clergyman in the Church of England, when accused of misconduct which might cause him to be deprived of his benefice, in which he otherwise had a freehold interest, or to lose a chaplaincy from which he can be removed. *Pemberton v. Colls* (1847) 10 Q. B. 461, 116 Eng. Reprint, 176, 16 L. J. Q. B. N. S. 403, 11 Jur. 1011; *Payne v. Beuwmorris* (1668) 1 Lev. 248, 83 Eng. Reprint, 391. It does not follow that words which would be [504] actionable in the case of a beneficed clergyman would be actionable if he is unbeneficed or without any other preferment.

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Gallwey v. Marshall (1853) 9 Exch. 294, 156 Eng. Reprint, 126, 2 C. L. R. 399, 23 L. J. Exch. N. S. 78, 2 Week. Rep. 106.

It was argued on behalf of the appellant that, although no precedent could be found in the books, the case came within a principle which had been already recognized, and that the words spoken are actionable *per se*, since they could not fail to be injurious to the plaintiff and imperil the continuance of his office as teacher. If the matter was open, I think that there is much weight in this argument. It is difficult to find any distinction in principle between a charge of dishonesty made against a trader in his private character and a charge of immorality made against a teacher in his private character. A teacher holds an office of high importance and responsibility, involving the care of the morality and character of his pupils. Apart from the finding of the jury, I agree with the conclusion of Lush, J., that the words spoken, which imputed to the appellant moral misconduct with a married woman, cannot fail to be injurious to him in the office which he holds. The conclusion which might naturally be drawn is that the law would assume damage without requiring proof. I am forced, however, to an opposite conclusion. The matter is not open. As the law of slander stands, words imputing moral misconduct to a plaintiff who holds an office such that the imputation cannot fail to be injurious to him are not actionable without proof of special damage unless they relate to his conduct in the office, or import an imputation connected with his official duties. Accepting, in this respect, the view taken by the Court of Appeal, it is unnecessary to consider the numerous cases to which your Lordships were referred. The judgment of Lord Denman in *Ayre v. Craven* (1834) 2 Ad. & El. 2, 8, 111 Eng. Reprint, 1, 4 Nev. & M. 220, 4 L. J. K. B. N. S. 35, is directly in point. Dr. Ayre, a physician, was accused as being a party in a crim. con. affair that had been long talked about, the innuendo being moral misconduct with a married woman. Lord Denman, after citing Bayley, B's judgment in *Lumby v. Allday* (1831) 1 Crompt. & J. 301, 148 Eng. Reprint, 1434, says: "In the present case much doubt was entertained whether the words were not actionable within the rule just adverted to. For, being laid as spoken of the plaintiff as a physician, in which character he may have opportunities [505] of

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abusing the confidence reposed in him, to commit acts of criminal conversation, the statement must be thought large enough to admit such proof to be adduced on the trial, in which case the necessary proof would be presumed to have been given, and the judgment ought not to be arrested. But, after full examination of the authorities, we think that, in actions of this nature, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession. For this defect the judgment must be arrested." The law as stated by Lord Denman has been accepted in later cases, and it cannot now be altered without an act of the legislature.

If it is necessary to find an historical reason why the imputation of immorality has been treated in a different way from the imputation of dishonesty, it may be found in a passage in Blackstone's Commentaries, book 3, chap. 8, p. 124: "So scandals, which concern matters merely spiritual, as to call a man heretic or adulterer, are cognizable only in the Ecclesiastical Court; unless any temporal damage ensues, which may be a foundation for a *per quod*." Up to 1855 a person in the position of the appellant still had a nominal remedy in the Ecclesiastical Courts, which had power to inflict penance on the defendant, though not to award damages to the plaintiff. By the Statute 18 & 19 Vict. chap. 41, the power of the Ecclesiastical Courts "to entertain or adjudicate upon any suit for or cause of defamation" was taken away, but no change was made in the remedies available in the secular court. A further argument against the contention made on behalf of the appellant may be found in the Slander of Women Act 1891. Up to this date charges of unchastity or immorality against women were not actionable without proof of special damage. Sect. 1 enacts that words spoken and published after the passing of the act which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable, provided always that in any action for words spoken and made actionable by the act a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action. If protection from imputations of unchastity or adultery in their private character is to be

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extended to men by [506] giving a right of action without the necessity of proof of special damage, this is a matter not for your Lordships, but for the legislature.

My Lords, the appeal fails and should be dismissed.

Lord Wrenbury: My Lords, slander is actionable only if either (1) special damage is proved, or (2) the imputation is such and the state of facts proved is such as that the law presumes or infers damage, or (3) the case falls within the Slander of Women Act 1891. This is a concise, and I hope an accurate, statement of the law.

Damage includes, but is not confined to, pecuniary damage. Slander by imputation of contagious disease, such as leprosy, is actionable. The damage in such case is the exclusion of the plaintiff from society. Slander by imputation of misconduct in an office which is not an office of profit is actionable. The reason for this is not very clear, but would seem to be that the slander might, if true, show that the man ought to be deprived of his office. See Lord Herschell in *Alexander v. Jenkins* [1892] 1 Q. B. 797, 802, 61 L. J. Q. B. N. S. 634, 66 L. T. N. S. 391, 40 Week. Rep. 546, 56 J. P. 452. At any rate it is not pecuniary damage. The damage need not be (although in most cases it is) pecuniary, but there must be damage proved or as matter of law presumed.

The fact that the imputation is a gross and grievous attack upon personal character is not of itself enough. For otherwise a statute would not have been necessary to enable a woman or a girl to sue for slander upon her chastity. The imputation must be such and the state of facts such, *not* as that a judge would necessarily or reasonably presume or infer damage, but as that judges in the past have presumed or inferred damage. This involves a confession which I fear must be made that the law of slander rests not upon any principle whose elasticity will admit new cases, but upon artificial distinctions. An artificial and arbitrary rule is not a principle. The plaintiff must, for success, bring his case within the very limited class of cases in which slander has been held actionable. He must show that the imputation is such and the state of facts is such as that a presumption of damage

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as matter of law has been made in the past under like circumstances. I am of course here [507] speaking, and throughout this opinion I am speaking, of cases in which damage is not proved.

Setting aside the case of slander actionable by statute under the Slander of Women Act 1891, there are only three heads within some one of which the plaintiff must bring his case; they are:

1. Imputation of crime.
2. Imputation of a contagious disease tending to exclude the plaintiff from society.
3. Imputation against the plaintiff in the way of his office, profession, or trade, or which will touch him in the way of his office, profession, or trade.

The present case is sought to be brought under the third head.

The instance of "touching a man in his trade," which is most profusely illustrated by authority, is the imputation of insolvency to a trader. In such a case it would seem that there is no necessity for a colloquium; for speaking, that is, of the insolvency with reference to the trade. The law, it appears, will take notice of the fact that solvency is so essential a factor in the existence of a trader that to speak of him as insolvent will necessarily "touch him in his trade;" it is an attack upon a necessary part of his trading equipment. This seems to be the *ratio decidendi* in *Read v. Hudson* (1700) 1 Ld. Raym. 610, 91 Eng. Reprint, 1308 (a lace man), *Stanton v. Smith* (1727) 2 Ld. Raym. 1480, 92 Eng. Reprint, 462 (a weaver), *Hooker v. Tucker* (1694) Holt, K. B. 39, 90 Eng. Reprint, 919 (a merchant), *Whittington v. Gladwin* (1826) 5 Barn. & C. 180, 108 Eng. Reprint, 67 (a merchant), and *Jones v. Littler* (1841) 7 Mees. & W. 423, 151 Eng. Reprint, 831 (a brewer).

By contrast with these cases is the case of the attorney or solicitor. In that case it would seem that there must be colloquium,—the words must be spoken of the plaintiff in the matter of his profession. If not, his action will fail. *Doyley v. Roberts* (1837) 3 Bing. N. C. 835, 132 Eng. Reprint, 632, 5 Scott, 40, 3 Hodges, 154, 6 L. J. C. P. N. S. 279; *Dauncey v. Holloway* [1901] 2 K. B. 441, 3 B. R. C. 54, 70 L. J. K. B. N. S. 695, 49 Week. Rep. 546, 84 L. T. N. S. 649, 17 Times L. R. 493. In that case the

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words are not actionable unless they impute either impropriety or misconduct in relation to or in connection with the profession or want of capacity to carry on the profession. It seems to have been assumed, but why I cannot say, that solvency is not a necessary part of the equipment of a solicitor. But even a solicitor [508] may be allowed an opportunity of proving special damage. *A. B. v. C. D.* (1904) 7 F. 22, 42 Scot. L. R. 37, 12 Scot. L. T. 395. An imputation of dishonesty seems to be enough in the case of a surveyor. *Blunden v. Eustace* (1618) Cro. Jac. 504 (case 15), 79 Eng. Reprint, 430. The reason assigned (one which, to myself, is far from convincing) is that "a surveyor is an officer of skill, and there is such an officer for the King who is mentioned in Acts of Parliament by that name." From which it seems to have been inferred that the words touched him in his profession. Probably the case is saved by the fact that the defendant had "communication with him [the plaintiff] about the measuring of land."

If the office be one of trust, an imputation of dishonesty in the calling touches the plaintiff in his calling and is actionable. *Seaman v. Bigg* (1633) Cro. Car. 480 (case 3), 79 Eng. Reprint, 1015. If the office be an office of honor, but not of profit, imputation of "misconduct in the office is actionable;" but a gross imputation such as that the plaintiff is an habitual drunkard and unfit for the office is not. *Alexander v. Jenkins* [1892] 1 Q. B. 797, 61 L. J. Q. B. N. S. 634, 66 L. T. N. S. 391, 40 Week. Rep. 546, 56 J. P. 452. Lord Herschell's judgment in that case is most instructive, and leaves the reader convinced that to look for a principle in the law of slander is an idle quest. Legislation is the only remedy which can establish a principle or lay down a satisfactory code. Lord Herschell summarizes this part of the law by saying that in the case of the office of profit "it must be either something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would show that he is a man who, by reason of his want of ability or honesty, is unfit to hold the office;" and that in the case of the office not of profit the mere imputation of want of capacity or ability is not enough; but there must be an imputation that the

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man ought to be deprived of his office, and which, therefore, involves a risk of exclusion from the office.

Solvency in a trader is perhaps the best illustration of what I take it was meant by the expression "general requisite" in the often-quoted words of Bayley, B., in *Lumby v. Allday* (1831) 1 Crompt. & J. 301, 305, 148 Eng. Reprint, 1434, 1 Tyrw. 217, 9 L. J. Exch. 62. It seems to mean something which the law recognizes without evidence as being necessary in the calling,—something necessary in the calling as [509] distinguished from something which may lead to dismissal from the calling. "Every authority which I have been able to find either shows the want of some general requisite as honesty, capacity, fidelity, etc., or connects the imputation with the plaintiff's office, trade, or business." The latter will do as, *e. g.*, if there be an imputation of unchastity in a servant girl *in relation to her employment*. *Connors v. Justice* (1862) 13 Ir. C. L. Rep. 451. But if the words are not applicable to conduct in the profession or calling the slander is not actionable, even though the words impute to a clergyman incontinence, he being unbeneficed (*Gallwey v. Marshall* (1853) 9 Exch. 294, 156 Eng. Reprint, 126, 2 C. L. R. 399, 23 L. J. Exch. N. S. 78, 2 Week. Rep. 106), or to a governess prostitution (*Wharton v. Brook* (1669) 1 Vent. 21, 86 Eng. Reprint, 15); or to a clerk of a gas company gross immorality (*Lumby v. Allday* (1831) 1 Crompt. & J. 301, 148 Eng. Reprint, 1434, 1 Tyrw. 217, 9 L. J. Exch. 62. In such a case the law seems to be that if the imputation does not touch the plaintiff in his calling there must be the colloquium,—the words must be spoken of him in his profession. The strongest case is *Ayre v. Craven* (1853) 2 Ad. & El. 2, 8, 111 Eng. Reprint, 1, where the words imputed adultery to a physician. Lord Denman there concludes his judgment by saying: "In actions of this nature the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession." That case was followed in *James v. Brook* (1846) 9 Q. B. 7, 115 Eng. Reprint, 1178, 16 L. J. Q. B. N. S. 17, 10 Jur. 541, where the defamation was of a salaried superintendent of police, and upon motion in arrest of judgment the judgment was arrested on the 10 B. R. C.

ground that the declaration did not show how the speaker connected the imputation with the profession. In *Jones v. Littler* (1841) 7 Mees. & W. 423, 151 Eng. Reprint, 831, 10 L. J. Exch. N. S. 171, the mention in the slanderous conversation of the man's trade (that of a brewer) would seemingly, apart from the fact that the imputation was of insolvency to a trader, have been enough.

The case before your Lordships' House is that of a schoolmaster, and the imputation is one of moral misconduct with a married woman. The calling was not mentioned in the conversation. The jury found that the words were spoken of the plaintiff in the way of his calling, but the Court of Appeal held (and I agree) that there was no evidence to support that finding. The question put to the jury, [510] however, goes on thus: "In the way of his calling, that is, in such a way as to imperil the retention of his office." I am unable to follow the intention of this paraphrase, or to see that it is a paraphrase. The jury answered the question in the affirmative, and further found that the words imputed that he was unfit to hold his office. What has most pressed me in the case is that Mr. Artemus Jones, who appeared for the defendants, admitted at the trial that the imputation would endanger the plaintiff's position. He admitted (to use his own expression, on further consideration) that "undoubtedly a public authority would remove him just as it would remove any other of its servants." His point was not that the imputation would not injure him, but that it was not said of him in his profession of a schoolmaster. In consequence of his admission the plaintiff abstained from calling evidence upon this point. I feel great doubt whether under these circumstances it was not open to the jury to find as they did, and whether the only point left was not whether the absence of the colloquium was necessarily fatal. This, I think, would be a point which would require careful consideration. However, as your Lordships do not attach the importance which I do to this aspect of the case, I shall not press my view to the extent of differing from the motion proposed by the noble and learned Lord on the woolsack.

Order of the Court of Appeal affirmed and appeal dismissed, with costs.

Lords' Journals, July 28, 1916.

Solicitors for appellant: *Baker & Nairne*.

Solicitors for respondents: *Rhys Roberts & Company, for Lloyd George & George, Criccieth*.

Note.—Imputation of immorality to man as slander or libel.

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II. Slander:

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I. Libel.

It is elementary that in many instances language which will not support an action for slander will nevertheless constitute actionable libel, the salient reason being that a libel is more deliberately prepared, more widely circulated, and more permanent than matter spoken by word of mouth. Written words, therefore, holding a person up to hatred, ridicule, and contempt, and which charge no crime, and consequently might not afford a ground for an action for slander, nevertheless will support an action for libel. It is therefore held that to impute by written words of a man that he has committed adultery, fornication, etc., is libelous *per se*, although such acts may not be criminally punishable.

UNITED STATES.—*Broad v. Deuster* (1878) 8 Biss. 265, Fed. Cas. No. 1,908; *Dempster v. Mann* (1907) 157 Fed. 319, reversed on other ground in (1910) 103 C. C. A. 325, 179 Fed. 837.

ILLINOIS.—*Hunner v. Evening American Pub. Co.* (1912) 175 Ill. App. 416.

MASSACHUSETTS.—*Bishop v. Journal Newspaper Co.* (1897) 168 Mass. 327, 47 N. E. 119.

MICHIGAN.—*Bailey v. Kalamazoo Pub. Co.* (1879) 40 Mich. 251; *Park v. Detroit Free Press Co.* (1888) 72 Mich. 560, 1 L.R.A. 599, 16 Am. St. Rep. 544, 40 N. W. 731.

NEW YORK.—*Johnson v. Synett* (1895) 89 Hun, 192, 35 N. Y. Supp. 79; *Stuart v. Press Pub. Co.* (1903) 83 App. Div. 467, 82 N. Y. Supp. 401; *O'Brien v. Bennett* (1902) 72 App. Div. 367, 76 N. Y. Supp. 498.

PENNSYLVANIA.—*Pitlock v. O'Niell* (1869) 63 Pa. 253, 3 Am. Rep. 544.

UTAH.—*Lowe v. Herald Co.* (1889) 6 Utah, 175.

VERMONT.—*Jones v. Roberts* (1901) 73 Vt. 201, 50 Atl. 1071.

In *Broad v. Deuster*, *supra*, where a publication in a newspaper
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that a man had maintained unlawful relations with the wives of other men was held libelous *per se*, the court said: "The publication complained of is, I think, clearly libelous. The argument of counsel for the defendant seemed to assume that, in order to constitute a libel, the publication must impute a crime, or charge something which, if uttered verbally, would have been actionable in itself as slander. But the distinction between slander and libel in this respect is well established; and it is settled that an action for libel may be sustained for words published which tend to bring the defendant into public contempt or ridicule, even though the same words spoken would not have been actionable."

And a publication in a paper that a certain lady was the mistress of the plaintiff has been held libelous *per se*. *Dempster v. Mann* (1907) 157 Fed. 319, reversed on other grounds in (1910) 103 C. C. A. 325, 179 Fed. 837.

And in *Stuart v. Press Pub. Co.* (1903) 83 App. Div. 467, 82 N. Y. Supp. 401, a publication in a newspaper that an action for divorce had been commenced by a certain man against his wife, and that affidavits by private detectives which accompanied the papers charged her with improper conduct with the plaintiff, was held to be libelous *per se*. And to the same effect is *Pittock v. O'Niell* (1869) 63 Pa. 253, 3 Am. Rep. 544.

It is libelous *per se* to publish of a man that his conduct with a certain woman was entirely unbecoming of him as a married man, and a minister of the Gospel, since this would tend to lower him in the estimation of the public and have a natural tendency to injure him in his profession. *Jones v. Roberts, supra*.

And in *Johnson v. Synett* (1895) 89 Hun, 192, 35 N. Y. Supp. 79, affirmed in (1898) 157 N. Y. 684, 51 N. E. 1091, where there was a publication in a newspaper that a minister had been arrested at a certain place, and that it was claimed that he was too much of a family man, and that he was still under cover, it was held that the matter was libelous *per se*.

So, also, in *Bailey v. Kalamazoo Pub. Co.* (1879) 40 Mich. 251, a publication concerning a minister, who was a candidate for office, reading: "Then there was that Iowa Beecher business of his, which beat him out of a station at Grass Lake," implying a charge of adultery, was held actionable.

In *Bishop v. Journal Newspaper Co.* (1897) 168 Mass. 327, 47 N. E. 119, where an article published in a newspaper, stating that a doctor, who was president of a club, had succumbed to the enticing charms of the caterer's pretty wife, and as a result the doctor's wife was about to bring proceedings for a divorce in which she would name the caterer's wife as corespondent, it was held that the publication was libelous; that even if it did not impute adultery to the

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doctor it tended to subject him to public ridicule, and to charge him with misconduct, and to impair his reputation and standing in the community, and that if it did impute adultery it was still more libelous.

And in *O'Brien v. Bennett* (1902) 72 App. Div. 367, 76 N. Y. Supp. 498, where a publication in a newspaper stated that plaintiff (giving his name) had been arrested at Coney island with a married woman for whom he had been buying drinks, and that she took the change returned by the waiter, as she claimed, to prevent the waiter from robbing him, it was held that the matter exposed him to public ridicule and contempt, and was libelous.

It has been held libelous to publish of a man that he lived with, and married, a certain woman, when at the time he had two wives. *Parker v. Meader* (1859) 32 Vt. 300.

And in *Park v. Detroit Free Press Co.* (1888) 72 Mich. 560, 1 L.R.A. 599, 16 Am. St. Rep. 544, 40 N. W. 731, it was held libelous to print an article stating that a married man had been arrested on a charge of bastardy.

In *Lowe v. Herald Co.* (1889) 6 Utah, 175, 21 Pac. 991, it was held libelous to publish a statement charging a man with adultery and rape, since it accused him of an indictable crime, and tended to expose him to public contempt.

And in *Thibault v. Sessions* (1894) 101 Mich. 279, 59 N. W. 624, the publication of an article headed, "Two Lake Linden School-teachers Guilty of Horrible Crimes," and containing language charging that the teachers had been guilty of indecent and criminal liberties and practices with the persons of their pupils, was held to be actionable *per se*.

And in *Wright v. Great Northern R. Co.* (1916) — Mo. App. —, 186 S. W. 1085, under a statute defining libel as the malicious defamation of a person made public by any writing tending to provoke him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, a publication was held libelous *per se* which charged a man with immoral and licentious conduct with a woman on a sleeping car.

In *Goodrich v. Davis* (1846) 11 Met. 473, a declaration in an action for libel alleged that the defendant caused to be published concerning the plaintiff statements, "Can you be guilty of breaking the seventh Commandment, and cover that noisy and licentious affair?" And after a recital of a part of the Tenth Commandment, "Thou shalt not covet thy neighbor's wife," have you a clear conscience on this subject? Is not conscience a little unquiet?" And it was held that the declaration charged the defendant with the publication of libelous matter affecting the plaintiff's character, and that, upon evidence admissible under the declaration, it would be competent

for the jury to find that the defendant charged the plaintiff with the crime of adultery.

In *Collins v. Dispatch Pub. Co.* (1893) 152 Pa. 187, 34 Am. St. Rep. 636, 25 Atl. 546, where the evidence tended to show the publication of a statement that complaint and demands for the removal of a postal inspector had been made on account of his intimacy with a certain woman, and also to show his dismissal, it was held that the case should have been submitted to the jury, and that it was error to grant a nonsuit.

II. Slander.

a. Imputation of adultery, fornication, or bigamy.

Oral imputations on a man's moral character, not amounting to a charge of a crime, are generally held not actionable as slander, in the absence of the proof of special damage, and as at common law adultery and fornication were not punishable criminally, it was held that orally to charge a man with such offenses did not constitute slander *per se*. *Dukes v. Clark* (1826) 2 Blackf. (Ind.) 20; *Lumpkins v. Justice* (1849) 1 Ind. 557; *Terwilliger v. Wands* (1858) 17 N. Y. 54, 72 Am. Dec. 420; *Wilson v. Robbins* (1832) Wright (Ohio) 40; *Parrat v. Carpenter* (1596) Cro. Eliz. pt. 2, p. 502, 78 Eng. Reprint, 752.

In *Hickerson v. Masters* (1921) 190 Ky. 168, 226 S. W. 1072, it is held that a charge of fornication against a man is not actionable *per se*, fornication being a mere misdemeanor punishable by fine, and not an infamous crime within the meaning of the rule that words imputing the commission of such a crime are actionable *per se*.

And in *Wagaman v. Byers* (1860) 17 Md. 183, it was held that to charge a man with having committed adultery was not actionable *per se*, since the crime of adultery was punishable only by a pecuniary fine.

And in *Parrat v. Carpenter, supra*, it was held not actionable at law to say of a clergyman that he was an adulterer and had had children by the wife of another man, and that the speaker would have him "deprived" for it, the court holding that this was a slander examinable only by the spiritual court.

In most jurisdictions at the present time, however, adultery and fornication are punishable criminally, and it is slander *per se* to impute to a man the commission of such offenses.

CONNECTICUT.—*Page v. Merwin* (1887) 54 Conn. 426, 8 Atl. 675.

IOWA.—*Georgia v. Kepford* (1876) 45 Iowa, 48.

MINNESOTA.—*Stroebl v. Whitney* (1884) 31 Minn. 384, 18 N. W. 98.

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NEW JERSEY.—*Joralemon v. Pomeroy* (1849) 22 N. J. L. 271.

NEW YORK.—*Dudley v. Nowill* (1896) 11 App. Div. 203, 42 N. Y. Supp. 681.

PENNSYLVANIA.—*Brown v. Lamberton* (1809) 2 Binn. 34; *Klumph v. Dunn* (1870) 66 Pa. 141, 5 Am. Rep. 355; *Beirer v. Bushfield* (1832) 1 Watts, 23; *Walton v. Singleton* (1821) 7 Serg. & R. 449, 10 Am. Dec. 472.

VERMONT.—*Holton v. Muzzy* (1858) 30 Vt. 365; *Bridgman v. Hopkins* (1861) 34 Vt. 532.

VIRGINIA.—*Payne v. Tancil* (1900) 98 Va. 262, 35 S. E. 725.

In *Page v. Merwin*, *supra*, a complaint charging slander in stating that a man was guilty of fornication was held to state a good cause of action, it being held actionable *per se*, as imputing moral turpitude, and this was held notwithstanding the crime of fornication was not punishable by infamous punishment.

And charging a married man with criminal connection with a negro wench constitutes slander *per se*, as it charges adultery, which is an indictable offense. *Klumph v. Dunn* (1870) 66 Pa. 141, 5 Am. Rep. 355.

And to say that a married man had "played" with a woman in a certain place, and that one of her children was his, charges the crime of adultery and constitutes actionable slander. *Brown v. Lamberton* (1809) 2 Binn. 34.

And in *Payne v. Tancil* (1900) 98 Va. 262, 35 S. E. 725, it is held that where adultery and fornication are made crimes by statute, it is actionable *per se* to charge that a man is "keeping" a certain woman.

Charging a man with being a whoremaster does not necessarily impute to him the crime of pandering. *Hickerson v. Masters* (1921) 190 Ky. 168, 226 S. W. 1072.

But such a charge against a married man has been held to impute to him the crime of adultery, and so to be actionable *per se*. *Georgia v. Kepford* (1876) 45 Iowa, 48.

And stating of a married man that he was guilty of "fornication" is actionable slander, adultery being in some cases an aggravated form of fornication. *Walton v. Singleton* (1821) 7 Serg. & R. 449, 10 Am. Dec. 472.

And it is actionable slander to say of a man, "He is such a whoring fellow that it is with difficulty he can keep a girl about the house, being continually a-riding them." *Ibid*.

And it is actionable slander to say of a man he "got to bed with" a woman not his wife. *Ibid*.

And it is slanderous to state that a man went to a certain place and committed adultery, but it is not slanderous to say that the speaker supposed the man went to the place to induce a certain

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woman to commit adultery with him. *Dickey v. Andros* (1859) 32 Vt. 55.

And in *Lovejoy v. Whitcomb* (1899) 174 Mass. 586, 55 N. E. 322, a declaration was held to charge a director of a church choir with criminal intercourse, and to state a cause of action for slander, where it alleged that the defendant stated that it was a pity that they had such a man for director; that his moral character was not good; that he had proof enough that he was "caught with the house girl;" that he was vile, and that there was no doubt that it was so.

And in *Bray v. Callihan* (1899) 155 Mo. 43, 55 S. W. 865, where a minister, who was also one of the school directors, said "that Mr. Bray, our teacher of last winter," is a villainous reptile, and that he had conducted himself in such a way that his certificate could be revoked, and that he was not fit to be in a decent community or to go with decent girls, and that the speaker advised mothers to look after their daughters, the words were held actionable *per se*.

As to what imputations of immorality affect a man in his business or profession so as to warrant a recovery for slander without proof of special damage, the authorities do not seem entirely in accord.

In *Hickerson v. Masters* (1921) 190 Ky. 168, 226 S. W. 1072, it was held actionable *per se* to say of a minister of the Gospel that he "is nothing but a whoremaster," without a colloquium referring to his calling, since, a minister being both a teacher and an exemplar of morality, there is no time when he is not engaged in the pursuit of his calling.

In *Demarest v. Haring* (1826) 6 Cow. 75, words importing a charge of incontinency against a clergyman were held actionable *per se*, since they imputed to him a want of those qualifications which were essential to his profession.

And in *Ritchie v. Widdemer* (1896) 59 N. J. L. 290, 35 Atl. 825, it was held that to say of a minister that wherever he had previously been employed he had had trouble with the female sex, and that in one instance the trouble was such that his wife threatened to leave, were derogatory words spoken of him in the way of his profession and therefore actionable without proof of special damage.

And in *Spears v. McCoy* (1913) 155 Ky. 1, 49 L.R.A. (N.S.) 1033, 159 S. W. 610, a charge that a male school-teacher kept the girls in after dismissing the boys and gave them candy and courted them was held actionable *per se* as tending to prejudice him in his profession.

And in *Hartley v. Herring* (1799) 8 T. R. 130, 4 Revised Rep. 614, a cause of action was held to be stated by a declaration in effect alleging that the plaintiff was employed to preach at a certain place and derived profit therefrom, but that because of the defendant's

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language, imputing incontinence to the plaintiff, the persons frequenting the chapel had refused to let him preach, and had discontinued giving him profits; and it was held unnecessary that he state the names of such persons.

And in *Dod v. Robinson* (1647) Aleyn, 63, 82 Eng. Reprint, 917, where the plaintiff alleged that he was inducted into a parsonage, and executed the office of pastor of a church, and that the defendant said of him that he was a drunkard, a whoremaster, a common swearer and liar, and had preached false doctrines, and deserved to be degraded, the words were held slanderous, since they charged good ground for having him degraded, which would be a temporal damage.

It has been held, however, that an action for slander cannot be maintained for statements imputing adultery to a medical man, although such imputation is alleged to have been made concerning him in his profession, where no actual damage is alleged, and it is not shown in what manner the statements were connected by the plaintiff with his profession. *Ayre v. Craven* (1834) 2 Ad. & El. 2, 111 Eng. Reprint, 1, 4 Nev. & M. 220, 4 L. J. K. B. N. S. 35.

And in *Lumby v. Allday* (1831) 1 Crompt. & J. 301, 148 Eng. Reprint, 1434, 1 Tyrw. 217, 9 L. J. Exch. N. S. 62, where a declaration alleged that the plaintiff was a clerk for a gas company, whereby he acquired gains and profits, and that the defendant stated that the plaintiff was a disgrace to the town, unfit to hold his situation for his conduct with whores, it was held that no cause of action was stated, as the imputation did not apply to the want of any qualities which a clerk ought to possess, and had no reference to his conduct as clerk.

In the reported case (*JONES v. JONES*, *ante*, 511) it was decided that, in the absence of proof of special damage, an action of slander would not lie for words imputing adultery to a man who was a schoolmaster, where they were not spoken of him touching his calling.

In *Brayne v. Cooper* (1839) 5 Mees & W. 249, 151 Eng. Reprint, 106, 9 L. J. Exch. N. S. 80, where defendant said of the plaintiff, "The business of staymaker does not keep him, but the prostitution of the person in the shop after it is shut; it is as bad as any bawdy-house in the town," it was held that the words did not relate to the plaintiff in his business, and were not actionable, unless they imputed that the plaintiff kept a bawdyhouse, which the jury found they did not.

It has been held that a statement that a man has two wives charges him with the crime of bigamy, and that an action for slander may be sustained without proof of special damage. *Wimberly v. Metcalf* (1888) 10 Ky. L. Rep. 353.

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And in *Dudley v. Nowill* (1896) 11 App. Div. 203, 42 N. Y. Supp. 681, it was held that charging that a man was the father of a child by a girl not fifteen constituted slander *per se*, since by statute it was made a crime punishable by imprisonment to have sexual intercourse with a girl under eighteen years.

In some cases within the scope of the present discussion, statutory provisions defining slander have been involved.

Thus, in *Haynes v. Robertson* (1915) 190 Mo. App. 156, 175 S. W. 290, where a statute made it actionable slander to publish falsely and maliciously that a person had been guilty of fornication or adultery, it was held slanderous *per se* to state that a minister had been caught in bed with the wife of one of his parishioners, and that her husband had blacked his eye.

And in *Birch v. Benton* (1858) 26 Mo. 153, under the Act of 1845 (Rev. Code 1845, p. 100), declaring it to be actionable to publish maliciously and falsely in any manner whatsoever that any person has been guilty of fornication and adultery, it was held that a charge that the plaintiff, a married man, kept his own negro woman, was slanderous.

And in *Morris v. Barkley* (1822) 1 Litt. (Ky.) 64, where a statute provided that every charge of incest, fornication, or adultery made by any citizen against one of the female sex should be placed on the same footing as other charges of a criminal nature for which an action would lie according to the principles of the common law, and that all and every person or persons for whom an action would lie for the speaking of scandalous words might have and maintain an action of slander for the speaking of words containing a charge of the commission of the offenses aforesaid, it was held that a man might maintain an action for slander where words were uttered imputing fornication to him. And to the same effect is *Philips v. Wiley* (1822) 2 Litt. (Ky.) 153.

In *Nidever v. Hall* (1885) 67 Cal. 79, 7 Pac. 136, where a complaint averred that pending an action for seduction brought by a certain woman against the defendant's son, the defendant in the presence of the plaintiff's father said that the plaintiff virtually acknowledged that he had sexual intercourse with the plaintiff in the seduction suit, and that by the use of these words the defendant intended to impute a want of chastity to the plaintiff, it appearing that the statute provided that an imputation of want of chastity constituted slander, it was held that the complaint was sufficient, but the plaintiff was held not to have made out his case, as he failed to prove how the words were understood by those who heard them.

b. Imputation of incest.

Where incest constitutes a crime, it has been held that an oral

imputation of a man to having committed such crime is actionable *per se*.

Thus, it has been held libelous *per se* to say of a man that he had carnal intercourse with his daughter, where incest is a crime. *Rea v. Harrington* (1885) 58 Vt. 181, 56 Am. Rep. 561, 2 Atl. 475.

And in *Lumpkins v. Justice* (1849) 1 Ind. 557, it was recognized that an action for slander would lie for charging a man with incest, if incest as defined by statute was alleged, but the allegations in that case were held insufficient to show a charge of statutory incest. And to the same effect is *Griggs v. Vickroy* (1859) 12 Ind. 549.

In *Guth v. Lubach* (1888) 73 Wis. 131, 40 N. W. 681, it was held that to charge a man with having "used" his daughter, who was the defendant's wife, and to state that her children belonged to her father, imputed the crimes of incest and adultery, and were actionable.

And in *Starr v. Gardner* (1858) 6 U. C. Q. B. O. S. 512, it was held actionable to impute incest to a paid minister, without showing special damages; since it implied a disqualification for his office. There was, however, a divided court in this case.

But in *Eure v. Odom* (1822) 9 N. C. (2 Hawks) 52, it was held that statements that the plaintiff was the father of his sister's child, and that the defendant could prove it, were not actionable slander, since incest was not punishable as a crime.

And in *Palmer v. Solmes* (1880) 30 U. C. C. P. 481, it was held that, incest not being a crime, it was not actionable slander to impute its commission to a man, in the absence of a showing of special damages.

In *Cassavoy v. Pattison* (1904) 93 App. Div. 370, 87 N. Y. Supp. 658, statements that a man had an adopted daughter, and that he was accustomed to go off and live with her for periods of a week at a time, leaving his wife at home alone, were held not slanderous *per se*, and not actionable, in the absence of an averment that they were uttered in reference to his calling, or had affected him in his business character.

c. Imputation of bastardy.

Bastardy not being a crime, it is held not slanderous *per se* to impute bastardy to a man.

Thus, in *Erwin v. Dezell* (1892) 64 Hun, 391, 19 N. Y. Supp. 784, it was held not actionable *per se* to say of a man that he had been arrested for bastardy, and was the father of a bastard child, since bastardy was not a crime under the laws of New York.

And in *Payne v. Thomas* (1918) 176 N. C. 401, 97 S. E. 212, it was held not slander *per se* to charge a man with bastardy, it not be-
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ing an indictable offense, and not carrying with it infamous punishment, although it involved moral turpitude.

And in *Gallwey v. Marshall* (1853) 9 Exch. 294, 156 Eng. Reprint, 126, 2 C. L. R. 399, 23 L. J. Exch. N. S. 78, 2 Week. Rep. 106, it was held that to charge a minister with incontinence, and with being the father of a bastard child, was not actionable, where it was not alleged that he was not beneficed, or was in the actual receipt of temporal emolument as a preacher.

But in *Payne v. Beucomorris* (1668) 1 Lev. 248, 83 Eng. Reprint, 391, it was held actionable slander to say of a minister that he had a bastard, and that the speaker could justify it, whereby the minister lost his chaplainship.

d. Imputation of sodomy, bestiality, or buggery.

In some jurisdictions where sodomy or bestiality was not indictable as a criminal offense, an imputation to a man of such acts has been held not actionable slander *per se*.

Thus, in Ohio, it has been held that words imputing an act of sodomy to a man, in the absence of a showing of special damage, are not actionable slander, since sodomy has not been declared a crime in that state. *Davis v. Brown* (1875) 27 Ohio St. 326; *Melvin v. Weiant* (1880) 36 Ohio St. 184, 38 Am. Rep. 572; *McKean v. Folden* (1859) 2 Ohio Dec. Reprint, 248.

And in *Coburn v. Harwood* (1822) Minor (Ala.) 93, 12 Am. Dec. 37, where it was sought to recover in an action for slander charging the crime against nature, it was held that the action could not be maintained, since the crime was not indictable under the common law or by statute, and since the words were not actionable in themselves, and there was no averment of special damage.

And in *Estes v. Carter* (1860) 10 Iowa, 400, it was held that sodomy was not a crime indictable under the criminal laws of Iowa, and that a statement charging a man with having committed sodomy was not actionable *per se*.

It is generally held, however, to be slanderous *per se* to impute sodomy or bestiality to a man. *Williams v. Gunnels* (1881) 66 Ga. 521; *Harper v. Delp* (1851) 3 Ind. 225; *Downs v. Hawley* (1873) 112 Mass. 237; *Goodrich v. Woolcott* (1824) 3 Cow. 231, affirmed in (1825) 5 Cow. 714; *Shartle v. Hutchinson* (1871) 3 Or. 337; *Coleman v. Goodwin* (1782) 3 Dougl. 90, 99 Eng. Reprint, 554, 2 Barn. & C. 285, note, 107 Eng. Reprint, 389, note; *Snell v. Webling* (1675) 2 Lev. 150, 83 Eng. Reprint, 493; *Poturite v. Barrel* (1664) 1 Sid. 220, 82 Eng. Reprint, 1068; *Collier v. Burrell* (1668) 1 Sid. 374, 82 Eng. Reprint, 1165; *Woolnoth v. Meadows* (1804) 5 East, 464, 102 Eng. Reprint, 1148, 2 Smith, 28, 7 Revised Rep. 742.

In *Downs v. Hawley* (1873) 112 Mass. 237, it was held actionable
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slander to state that the plaintiff had committed sodomy with a mare, and it was held sufficient to prove the substance of the words used and the sense and manner of speaking them.

And it has been held actionable slander to say, "I know what I am, I know what Snell is; I never buggered a mare." *Snell v. Webling* (1675) 2 Lev. 150, 83 Eng. Reprint, 493.

And stating that a man had been seen ravishing a cow was held to charge the crime of bestiality, and to be actionable *per se*. *Harper v. Delp* (1851) 3 Ind. 225.

And it is actionable slander to say of a man that he will lie with a cow again, as he did, and that if he had his deserts he would be hanged. *Poturita v. Barrel* (1664) 1 Sid. 220, 82 Eng. Reprint, 1068.

And also to say of a man that he is a buggering rogue. *Collier v. Barrel* (1668) 1 Sid. 374, 82 Eng. Reprint, 1165.

And in *Goodrich v. Woolcott* (1821) 3 Cow. 231, affirmed in (1825) 5 Cow. 714, a count alleging the publication by the defendant of the words, "He [meaning the plaintiff] has been with a sow, and I can prove it," and stating that the defendant thereby intended to convey the idea that the plaintiff had committed the crime against nature, was held good.

And in *Shigler v. Snyder* (1874) 45 Ind. 541, which was an action for slander, it was alleged that the words used had a provincial meaning in the neighborhood where they were spoken, and that they meant, and were understood to mean, that the plaintiff had been guilty of sexual intercourse with a sow, and such allegations were held sufficient.

And a cause of actionable slander is set out by a declaration stating that the defendant said of the plaintiff, a man who was about to join a society, that he would be disgraceful to any society; that whoever proposed him must have intended it as an insult; that the speaker would pursue him and hunt him from all society, and would not leave a stone unturned to publish his shame and infamy; that delicacy forbade him from bringing a direct charge, but that it was a male child who complained. *Woolnoth v. Meadows* (1804) 5 East, 464, 102 Eng. Reprint, 1148.

J. T. W.

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[ENGLISH DIVISIONAL COURT.]

IN RE PEARSON.

SMITH v. PEARSON.

[1920] 1 Ch. 247.

Also Reported in 89 L. J. Ch. N. S. 123, 122 L. T. N. S. 515.

Will — Gift to testator's child — Decease of child in parent's lifetime leaving issue — Bankruptcy of child — Title of trustee in bankruptcy.

A share of residue bequeathed to testator's son, who died during testator's lifetime an undischarged bankrupt, leaving issue surviving testator, passed to his trustee in bankruptcy, and not to his issue, under a statute providing that where any issue of a testator to whom an estate is bequeathed, not determinable before testator's death, shall die in testator's lifetime and the issue of such person shall be living at testator's death, the bequest shall not lapse but take effect as if such person's death had happened immediately after the testator's death, unless a contrary intention appears in the will, such statute effecting an artificial prolongation of the legatee's life beyond testator's death, and the legacy being subject to all conditions affecting the legatee at the time of his death.

The *dictum* of Stirling, L.J., in *In re Scott* [1901] 1 K. B. 228, 240, 5 B. R. C. 840, 70 L. J. Q. B. N. S. 66, 65 J. P. 84, 49 Week. Rep. 178, 83 L. T. N. S. 613, 17 Times L. R. 148, approved and followed.

(October 23, 1919.)

ISAAC PEARSON by his will, dated April 5, 1911, appointed Henry Smith and Henry John Brown executors and trustees thereof, and gave his residuary real and personal estate to them upon trusts for conversion thereof, and to hold the proceeds in trust for his children Hannah F. J. Church, Thomas Stephen Pearson, and Henry F. Pearson, in equal shares. The will contained a proviso that the trustees should deduct from and retain out of the share to which Thomas Stephen Pearson might become entitled the sum of 350*l.* due from him to the testator. On March 23, 1915, a receiving order in bankruptcy was made against T. S. Pearson on his own petition, and on the same day he was adjudicated a bankrupt. On March 29, 1915, the official receiver became, and at the date of these proceedings he was, the trustee in the bankruptcy. T. S. Pearson never obtained his order of discharge, and he died intestate, in the lifetime of the testator, on 10 B. R. C.

October 3, 1915, leaving four children, one of whom was Thomas Henry Pearson. The testator died on March 8, 1917, and his trustees and executors took out an originating summons, to which Thomas Henry Pearson and Thomas S. Pearson's trustee in bankruptcy were the defendants, raising the questions (1) whether, by reason of the death intestate of T. S. Pearson [248] in the lifetime of his father, leaving issue at the time of his father's death, his share in the estate went to his next of kin or to his trustee in bankruptcy; and (2) whether the trustees, before paying over T. S. Pearson's share, should deduct therefrom the sum of 350l.

C. P. Sanger, for the plaintiffs, stated the facts, and referred to § 33 of the Wills Act 1837, and said that there was no actual decision on the questions raised by the summons.

R. H. Hodge, for the defendant T. H. Pearson. Sect. 33 of the Wills Act 1837 passed the interest of T. S. Pearson, to which he would have been entitled had he survived his father, to T. S. Pearson's next of kin, and they, and not the trustee in bankruptcy, are entitled to the third share which their father would have taken if he had survived his own father, the testator. T. S. Pearson himself never had vested in him, and was never at any time entitled to, that share, and consequently it could not be "property of the bankrupt divisible amongst his creditors" within the meaning of § 38 of the Bankruptcy Act 1914; the share never devolved upon him. The trustee in bankruptcy has no decision in his favor, but will doubtless ask the court to rely on a dictum.

G. T. Simonds (**W. R. Sheldon** with him), for the trustee in bankruptcy. It must be admitted that the trustee in bankruptcy takes the share of T. S. Pearson subject to the debt of 350l. due to the testator. But, subject to that, he is entitled to T. S. Pearson's share of residue. By virtue of § 33 of the Wills Act 1837, that share became part of his estate, subject not only to his debts, but also to any disposition made by him either by will or otherwise. What Stirling, L.J., said in *In re Scott* [1901] 1 K. B. 228, 240, 5 B. R. C. 840, 70 L. J. Q. B. N. S. 66, 65 J. P. 84, 49 Week. Rep. 178, 83 L. T. N. S. 613, 17 Times L. R. 148,—namely, that "if the child died an undischarged bankrupt, it"—
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the legacy—"will vest in the trustee in bankruptcy,"—is no doubt only a *dictum*, but it should be adopted as a decision.

Sargant, J.: I am surprised to find that the particular point raised by this summons has never been the subject of [249] an actual decision. That question is as to the effect of § 33 of the Wills Act 1837, which provides that "where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

In the present case the testator gave a third of his residuary estate to his son T. S. Pearson, who was adjudicated a bankrupt before his father's death. Before the date of that death, a trustee in the bankruptcy was appointed, and T. S. Pearson was at the time of his own death an undischarged bankrupt. He left four children surviving him. All the conditions mentioned in § 33 of the Wills Act were satisfied in the present case. It is observable that there is no gift under that section in favor of the issue of the deceased child of the testator. The provision made by the section is in favor of the legatee himself. The property coming to him under the section may be disposed of by him either during his lifetime or by his will, and, if he dies intestate, it passes to the persons entitled by the intestacy, and it is subject to the payment of his debts. The section, in short, effects an artificial prolongation of the legatee's life beyond the death of the testator, and he takes his legacy subject to all the conditions affecting him at the time of his own death. *Prima facie*, then, the property passed at the time of the legatee's death as artificially ascertained by the section.

By § 38 (a) of the Bankruptcy Act 1914, it is provided that the property of the bankrupt divisible among his creditors shall comprise, amongst other things, all such property "as may devolve on him before his discharge," and Mr. Hodge, as counsel for the
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next of kin of T. S. Pearson, argued that the death of the bankrupt operated as a discharge from his bankruptcy, and that the consequence must follow [250] that the share of T. S. Pearson in the residue did not devolve on him until after the determination of his bankruptcy. But § 33 of the Bankruptcy Act 1914 does not refer to property devolving during the continuance of the bankruptcy, but to property of the bankrupt devolving "before his discharge." As a matter of fact the bankrupt never did obtain his discharge. The effect of the artificial prolongation of his life by § 33 of the Wills Act was to cause the property left to him to devolve on him before his discharge.

Moreover, there is the important statement of Stirling, L.J., in *In re Scott* [1901] 1 K. B. 228, 239, 5 B. R. C. 840, 70 L. J. Q. B. N. S. 66, 65 J. P. 84, 49 Week. Rep. 178, 83 L. T. N. S. 613, 17 Times L. R. 148, which to my mind seems to amount to something stronger than a mere *dictum*, as the whole of the judgment is based on the principle involved in that statement. The learned judge said: "If the child, while living, entered for valuable consideration into any contract with reference to such property (as, for example, by way of sale or mortgage, or by way of covenant in a marriage settlement), by such contract the property will be bound. If the child made a will by which such property is, by appropriate language, disposed of, either specifically or otherwise, the property will pass under such disposition. If the child died intestate, the property will go to the persons entitled by law as upon an intestacy. If the child died an undischarged bankrupt, it will vest in the trustee in bankruptcy, and so on."

In my judgment, the trustee in bankruptcy of the child taking under his father's will, who is the general assignee of the bankrupt under the act, is in quite as good a position as a special assignee, or devisee, or legatee of the child, or anyone else claiming under him.

I may add that the language of § 38 of the Bankruptcy Act 1914 is exactly the same as that in the corresponding § 44 of the Bankruptcy Act 1883. This seems to me to be some additional reason for the decision at which I have arrived. For the *dictum* of Stirling, L.J., in *In re Scott*, *supra*, gave a judicial interpretation
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tion of § 44 of the Act of 1883; and afterwards this section was re-enacted verbatim in § 33 of the Act of 1914.

[251] It must, therefore, be declared that the share of residue by the will of Isaac Pearson given to his son T. S. Pearson passed to the son's trustee in bankruptcy, subject to deduction of the sum of 350*l.* referred to in the will.

Solicitor for the plaintiffs: *R. H. Bentley, for T. G. Baynes, Dartford.*

Solicitors for the defendants: *Bentley & Jenkins; Tarry, Sherlock, & King.*

Note.—Right of trustee in bankruptcy of legatee dying before testator to claim legacy under statute preventing lapse.

The decision in the reported case (*RE PEARSON*, ante, 554) is of special interest and importance in view of the fact that it appears to be the only one which has passed on the right of a trustee in bankruptcy to claim a legacy or devise under the statute preventing a lapse. The statute involved provided that "where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will;" and a section of the Bankruptcy Law provided that the property of a bankrupt divisible among his creditors shall comprise all such property "as may devolve on him before his discharge." Under these provisions, where it appeared that a legacy was given to a son by his father's will, and that he had been adjudged a bankrupt and had died before his father without obtaining his discharge as a bankrupt, and leaving issue, it was held that the statutory provision was in favor of the legatee, and not his issue, and that his trustee in bankruptcy was entitled to the legacy, the court stating that the statute effected an artificial prolongation of the legatee's life beyond the death of the testator, and that the legacy was taken subject to all the conditions affecting him at the time of his own death.

In reaching its conclusion it will be noticed that the court relied upon the *dictum* contained in the opinion of Stirling, *L.J.*, in *Re* 10 B. R. C.

Scott [1901] 1 K. B. 228, 5 B. R. C. 840, 70 L. J. Q. B. N. S. 66, 85 J. P. 84, 49 Week. Rep. 178, 83 L. T. N. S. 613, 17 Times L. R. 148, where; in upholding the right of a devisee who died during the testator's life in turn to devise the property, it was said, among other things, that under the statute above quoted, if the child died an undischarged bankrupt, the property would vest in the trustee in bankruptcy.

Attention may be directed to the fact that the provisions of the statutes for the prevention of the lapsing of legacies vary considerably, and that under some of these a different decision than that in the reported case might be reached.

J. T. W.

[NEW SOUTH WALES SUPREME COURT.]

MUIR v. ARCHDALL.

19 New So. Wales, 10.

Charities — Bequest for cathedral building fund — No present intention to build — Validity.

A bequest to a cathedral chapter for a new cathedral when they should build, no definite scheme for building being in contemplation, is void for perpetuity, the particular purpose not being capable of taking effect at the death of the testator.

— Bequest for cathedral window — Validity.

A bequest for a cathedral window is good.

Perpetuities — Bequest to keep grave in order — Validity.

A bequest of a sum of money in trust to apply the interest to keeping the testator's grave in order is void as a perpetuity for a noncharitable object.

Will — Effect of partial invalidity.

Where a bequest in trust is for two distinct purposes without any expression of preference between them, and one proves illegal, there is an intestacy as to a moiety thereof.

Descent and distribution — Partial intestacy — Effect of exclusion of next of kin by will.

A declaration by a testator that one of his next of kin shall have no share in what he has disposed of by will does not exclude him from participation in property undisposed of; but a declaration that one of his next of kin shall have no share in his property may be effective as amounting to a gift by implication of any undisposed-of property to the others of the class.

— Declaration that certain person shall take nothing.

A declaration in a will which on its face purports to dispose of all testator's property, that a certain person who was one of his next of

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kin and another person who was not are "not to have a penny," is ineffective to exclude the former from participating in that portion of the testator's estate as to which there proved to be an intestacy.

(December 16, 1918.)

ORIGINATING summons by the executor of the will of William Chaff for the determination of a number of questions arising on the construction of the will of the testator, which, so far as material for this report, were as follows: (1) Is the legacy [11] "balance of all moneys to be given to St. Andrew's Cathedral, Sydney, chapter, for new cathedral when they should build and window" a valid legacy, or does it fail under the rule against perpetuities? (6) Does the provision in the will that testator's brother, Arthur George, "is not to have one penny," prevent Arthur George from taking any part of testator's estate as one of his nex of kin? (7) Is the legacy of 200*l.* to the Church of England trustee at Sangate "to keep testator's grave in order interest only to be used to keep grave in order" a valid bequest?

With reference to the first question it appeared that in 1913 a committee was appointed to consider the question of the sale of the site of St. Andrew's Cathedral and the building of a cathedral on another site. This committee presented an interim report, dated February 10, 1914, and later passed the following resolution: "That this committee beg to present its interim report, and, in view of the uncertainty as to the intentions of the government with regard to a city railway, the committee considers that it is not possible to make any further report at present." The committee in their report found that the present cathedral was inadequate in dimensions and accommodation for the city of Sydney, but did not advise that a new cathedral should be built. No further report had since been made on this question, but the committee had since reported on proposals to enlarge the chapter house and the Deanery building. The evidence showed that since the interim report was presented the inadequacy of the accommodation of the cathedral was more pronounced, but that the further consideration of the question of building a new cathedral had been in abeyance during the period of the war.

Sheppard, for the plaintiff, stated the first question.

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Maughan, for the defendant **J. H. Chaff**. The legacy to the chapter is void, as there is no general charitable intention expressed. The legacy is given for a specific object, and the validity of the gift must be determined in the same way as in the case of other gifts. The particular purpose must be capable of taking effect at the death of the testator. Even if the gift is construed as an immediate gift, it is invalid, as there is no [12] present intention to build a new cathedral, and it may never be possible to do so. [He referred to *Chamberlayne v. Brockett* (1872) L. R. 8 Ch. 206, 42 L. J. Ch. N. S. 368, 28 L. T. N. S. 248, 21 Week. Rep. 299; *Re White* (1886) 33 Ch. D. 449, 55 L. J. Ch. N. S. 701, 55 L. T. N. S. 162, 34 Week. Rep. 771; *In re Packe, Sanders v. Attorney-General* [1918] 1 Ch. 437; *Wallis v. Solicitor-General for New Zealand* [1903] A. C. 173.]

[**Harvey, J.**, referred to *Attorney General v. Bishop of Chester* (1785) 1 Bro. Ch. 444, 28 Eng. Reprint, 1229; *Sinnett v. Herbert* (1872) L. R. 7 Ch. 232, 41 L. J. Ch. N. S. 388, 20 Week. Rep. 270.]

The gift for window also fails as it is a gift for a window in the new cathedral.

Mann, for the cathedral chapter. The cases where the attainment of the object is impossible at the death of the testator are distinguishable. The object in this case is not impracticable. There is an immediate gift of the fund to the chapter. The evidence shows that the question of rebuilding the cathedral has been considered, but that the question is now in suspense. Where there is a gift for a charitable object or purpose which requires something to be brought into existence after the testator's death, it can never be said that this will certainly be carried out within a definite time after the testator's death. But the mere uncertainty as to the exact date when the testator's intention will be carried out will not invalidate the gift. It is sufficient that the gift is immediate. The fact that the intention cannot be immediately carried out is immaterial. If the gift were a contingent gift, *e. g.*, a gift to the chapter in the event of their deciding to build a new cathedral, the result might be different. [He referred to *Fisk v. Attorney-General* (1867) L. R. 4 Eq. 521, 15 Week. Rep. 1200; *Re Birkett* (1878) 9 Ch. D. 576, 47 L. J. Ch. N. S. 846; *Re Tyler* [1891] 3 10 B. R. C.

Ch. 252, 60 L. J. Ch. N. S. 686, 65 L. T. N. S. 367, 40 Week. Rep. 7. In any event the gift as regards the window is valid.

Maughan, in reply, referred to *Biscoe v. Jackson* (1881) 50 L. J. Ch. N. S. 597; *In re Rogerson* [1901] 1 Ch. 715, 70 L. J. Ch. N. S. 444, 84 L. T. N. S. 200.

Cur. adv. vult.

Sheppard, for the plaintiff, stated question No. 6.

Jaques, for the defendant A. G. Chaff. The direction that the testator's brother George is "not to have a penny" is inoperative as regards the property as to which there is an intestacy. It is not a gift by implication of this property [13] to the next of kin of the testator other than George. *Johnson v. Johnson* (1828) 4 Beav. 318, 49 Eng. Reprint, 361; *Re Holmes* (1890) 62 L. T. N. S. 383; *Vachell v. Breton* (1706) 5 Bro. P. C. 51, 23 Eng. Reprint, 527; *Penny v. Milligan*, 5 C. L. R. (Austr.) 349; Jarman on Wills, p. 679.

Maughan, for the defendant J. H. Chaff. A gift in clear language excluding one of the next of kin is a gift by implication to the other members of the class. The words "not to have a penny" apply both to the property passing under the will and the personalty undisposed of, otherwise they are meaningless. [He referred to *Bund v. Green* (1879) 12 Ch. D. 819, 28 Week. Rep. 275.]

Cur. adv. vult.

Sheppard, for the plaintiff, stated question No. 7.

Bethune, for the trustee at Sangate. The trustee of a burial ground is a charity. If the object fails the fund can be applied *cy près*. [He referred to *In re Manser* [1905] 1 Ch. 68, 1 B. R. C. 923, 74 L. J. Ch. N. S. 95, 53 Week. Rep. 261, 92 L. T. N. S. 79; *Attorney-General v. Trinity College Cambridge* (1856) 24 Beav. 383, 53 Eng. Reprint, 405; *In re Davies* [1915] 1 Ch. 543, [1915] W. N. 98, 84 L. J. Ch. N. S. 493, 112 L. T. N. S. 1110, 79 J. P. 291, 59 Sol. Jo. 413; *Re Tyler* [1891] 3 Ch. 252, 60 L. J. Ch. N. S. 686, 65 L. T. N. S. 367, 40 Week. Rep. 7.]

Jaques, Mann, and Maughan, for other defendants, were not called upon.

Harvey, J., held that the gift was void as stated in the judgment (*infra*).

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Harvey, J.: This is an originating summons for the construction of the will of William Chaff. I have decided several of the questions raised, but reserved my decision upon two points. The testator by his will, after a number of bequests, directed the balance of all money to be given "to St. Andrew's Cathedral Sydney Chapter for new cathedral when they should build and window." It is contended that this is not a good charitable gift, that there is no prospect of a new cathedral being built within a reasonable time, and that the gift cannot be administered *cy près*. The gift is very similar to the second gift considered by Lord Hatherley, L.C., in *Sinnott v. Herbert* (1872) L. R. 7 Ch. 232, 41 L. J. Ch. N. S. 388, 20 Week. Rep. 270. There a testator left a sum of residue to named trustees upon trust to be by them applied in aid of erecting or of endowing an additional church at a named place. His [14] Lordship there directed an inquiry whether the funds could be laid out and employed for the purpose for which the testator had directed. His Lordship appears to have been of the opinion that if it could within a reasonable time be applied for that object it should be so applied, and that if it could not, the question would arise whether it could be applied *cy près*, but that it could not be allowed to remain tied up indefinitely on the chance that some day or other it might be applied for the specific purpose for which the testator directed. The affidavits filed in this suit show that proposals for enlarging and also proposals for rebuilding the present St. Andrew's Cathedral have been the subject of consideration by committees of the Anglican Synod at various times, but these proposals are only in the air; there is nothing definitely contemplated at the present time, and it is quite uncertain what period of years may elapse before anything of the kind is carried out, and whether it will ever be attempted without something at present unforeseen happening. Under these circumstances I feel no alternative but to declare that the gift fails unless it can be applied *cy près*.

In my opinion, the question whether a charitable trust fails *ab initio*, or can be applied *cy près* to some other charitable purpose, depends entirely upon the consideration whether a general charitable intent, apart from the particular charitable object, is disclosed.

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In my opinion, no general charitable intent is shown in this case; it cannot, in my opinion, be gathered from the character of the body to whom the money is bequeathed. In earlier cases the courts were more astute to find general charitable purposes than they are now. At the present day it is treated as a pure question of construction whether there are words which indicate a general charitable intention over and above the specific named object. I cannot find a general charitable object in these words, and, in my opinion, the trust fails. The second part of the trust, for a window, however, is, in my opinion, good; the ordinary grammatical construction does not indicate that the window is to be in the new cathedral or that the money is to be paid to the trustees when the new cathedral is built; it is in terms a gift to the St. Andrew's [15] Cathedral chapter for a window, i. e., a window in St. Andrew's Cathedral.

Following the rule in such cases it appears to me the residue should be divided into moieties, and half given to the chapter for a window. It is not a gift to one purpose which is illegal and the residue of the funds for a legal purpose, but a gift to two distinct objects; the testator may have intended that the window should be the first object and the balance go to the new cathedral, but he has not said so. He has given the grant for two purposes, either of which might have exhausted the whole. Under these circumstances the grant must be divided according to the number of objects. See *Re Vaughan* (1886) 33 Ch. D. 187, 55 L. T. N. S. 547, 35 Week. Rep. 104, 51 J. P. 70; *Hunter v. Attorney-General* [1899] A. C. 309, at p. 324, 68 L. J. Ch. N. S. 449, 47 Week. Rep. 673, 80 L. T. N. S. 732, 15 Times L. R. 384.

The second question arises as to the destination of the half of the residue of the estate which goes over. The testator by his will gives certain legacies to brothers, sisters, nephews, and nieces. He also gives a legacy of 200*l.* to the Church of England trustee at Sandgate Cemetery to keep the testator's grave in order, the interest only to be used. I held that this bequest was void as a perpetuity for a noncharitable object. It accordingly fell into the residue which was bequeathed to St. Andrew's Cathedral chapter in the terms already set out. Following the gift to the chapter the will proceeds as follows: "John J. Proudford to keep all cash
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in hand for work done and many kindnesses and is out of my debt. Mabel F. Proudford is out of my debt through not being left in my will. My brother George not to have a penny," for a certain reason stated, "nor Edgar Chaff" for the same reason. The testator's brother George was one of his next of kin, Edgar Chaff, mentioned in his will, was not. The question is whether the reference to his brother George not getting a penny is by implication a gift of his undisposed-of personalty to his next of kin other than George. A declaration by a testator that none of his next of kin shall take any portion of his property is of no effect if he in fact leaves property undisposed of, but a declaration that one of his next of kin shall be excluded may be effective, and may amount to a gift by implication of any undisposed-of property to the others of the class. This depends [16] upon the construction of the will, *i. e.*, whether the testator says that the person excluded is to have no share in his property or merely no share in what he has disposed of by his will. Where a testator makes a will which in terms disposes of the whole of his property, and then says one of his next of kin is to have nothing under his will, this will not prevent the person named from sharing in any bequest which may lapse or fail. This was the case in *Re. Holmes* (1890) 62 L. T. N. S. 383. A codicil revoking a gift in the will to one of the next of kin will not prevent that person sharing in the property as one of the next of kin if it is not effectively disposed of. *Ramsay v. Shelmardine* (1865) 1 Eq. 129. If the testator says that certain of the next of kin are to take nothing from his property as to which he may die intestate, that is, by implication, a gift of such property to the other next of kin. See *Bund v. Green* (1879) 12 Ch. D. 819, 28 Week. Rep. 275. The expression in the present will is not so specific as those in the cases I have referred to. He says George is not to have a penny, but it is to be noticed that he says the same about Edgar, and in his case it could not be considered as a gift by implication to the testator's next of kin; it can only express the reason why Edgar Chaff is left out of his will.

As the testator has on the face of the will completely disposed of all his property, as he coupled Edgar Chaff with George Chaff in the same form of words, considering also the form of the two

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gifts to his debtors immediately preceding, I feel bound to hold that the testator had not in contemplation anything beyond the provisions he had made in his will. He was, in my opinion, merely giving a reason why he had left his brother out, and he was not by implication giving his residuary estate to his other next of kin. For these reasons I hold that George Chaff is entitled to a share with the other next of kin in the half of the residuary estate which lapses.

Solicitors: *H. de Y. Scroggie; Gould & Shaw.*

Note.—Effect of declaration of will cutting off heir or next of kin or restricting him to provision made, to exclude him from participation in testator's property.

I. Introductory, 500.

II. Restrictive words in connection with gift as putting legatee to an election, 509.

III. Instances in which gift to others has been implied, 572.

IV. Instances in which existence of implied gift to others is negatived, 574.

V. Words of exclusion or restriction as excluding persons mentioned from class to whom the gift is made in another part of will, 585.

I. Introductory.

The courts are agreed that, while a testator may dispose of his property by will as he pleases, he cannot deprive those who are, by law, entitled to his estate, by words of exclusion only; but may do so only by giving his property to somebody else.

ALABAMA.—*Denson v. Autrey* (1852) 21 Ala. 205; *Banks v. Sherrod* (1875) 52 Ala. 267; *Whorton v. Moragne* (1878) 62 Ala. 201; *Wolffe v. Loeb* (1893) 98 Ala. 426, 13 So. 744; *Caldwell v. Caldwell* (1920) 204 Ala. 161, 85 So. 493.

CALIFORNIA.—*Re Walkerly* (1895) 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; *Campbell-Kawannanakoia v. Campbell* (1907) 152 Cal. 201, 92 Pac. 184.

DELAWARE.—*Re Reed* (1906) — Del. —, 64 Atl. 822.

GEORGIA.—*Wright v. Hicks* (1852) 12 Ga. 155, 56 Am. Dec. 451; *Wilder v. Holland* (1897) 102 Ga. 44, 29 S. E. 134.

ILLINOIS.—*Lawrence v. Smith* (1896) 163 Ill. 149, 45 N. E. 259; *Parsons v. Millar* (1907) 189 Ill. 107, 59 N. E. 606; *Ames v. Holmes* (1901) 190 Ill. 561, 60 N. E. 858; *Bond v. Moore* (1908) 110 B. R. C.

236 Ill. 576, 19 L.R.A.(N.S.) 540, 86 N. E. 386; *Tea v. Millen* (1913) 257 Ill. 624, 45 L.R.A.(N.S.) 1163, 101 N. E. 209.

INDIANA.—*Thomas v. Thomas* (1886) 108 Ind. 576, 9 N. E. 457.

KANSAS.—*Andréws v. Harron* (1898) 59 Kan. 771, 51 Pac. 885.

KENTUCKY.—*Clarkson v. Clarkson* (1871) 8 Bush, 655; *Phillips v. Phillips* (1892) 93 Ky. 498, 20 S. W. 541; *Todd v. Gentry* (1901) 109 Ky. 704, 60 S. W. 639; *Walters v. Neafus* (1910) 136 Ky. 756, 125 S. W. 167; *Duff v. Duff* (1912) 146 Ky. 201, 142 S. W. 242; *Phelps v. Stoner* (1919) 184 Ky. 466, 212 S. W. 423.

MARYLAND.—*Stewart v. Pattison* (1849) 8 Gill, 46; *Zimmerman v. Hafer* (1895) 81 Md. 347, 32 Atl. 316; *Bourke v. Boone* (1902) 94 Md. 472, 51 Atl. 396.

MASSACHUSETTS.—*Brown v. Brown* (1911) 209 Mass. 388, 95 N. E. 796.

MISSOURI.—*Watson v. Watson* (1892) 110 Mo. 164, 19 S. W. 543; *Hurst v. Von De Veld* (1900) 158 Mo. 239, 58 S. W. 1056; *Hadley v. Forsee* (1907) 203 Mo. 418, 14 L.R.A.(N.S.) 49, 101 S. W. 59.

NEW HAMPSHIRE.—*Wells v. Anderson* (1899) 69 N. H. 561, 44 Atl. 103.

NEW JERSEY.—*Linell v. Linell* (1870) 21 N. J. Eq. 81; *Nagle v. Conrad* (1912) 80 N. J. Eq. 253, 86 Atl. 1103, affirming (1911) 79 N. J. L. 124, 81 Atl. 841.

NEW YORK.—*Roosevelt v. Fulton* (1827) 7 Cow. 71; *Hartun v. Corse* (1848) 2 Barb. Ch. 506; *Chamberlain v. Taylor* (1887) 105 N. Y. 185, 11 N. E. 625; *Gallagher v. Crooks* (1892) 132 N. Y. 338, 30 N. E. 746, reversing (1890) 57 Hun, 592, 32 N. Y. S. R. 1098, 11 N. Y. Supp. 497; *Pomroy v. Hincks* (1904) 180 N. Y. 73, 72 N. E. 628; *Re Trumble* (1910) 199 N. Y. 454, 92 N. E. 1073, (modifying (1910) 137 App. Div. 483, 122 N. Y. Supp. 763); *Rauchfuss v. Rauchfuss* (1883) 2 Dem. 271; *Henriques v. Yale University* (1898) 28 App. Div. 354, 51 N. Y. Supp. 284, appeal dismissed in (1899) 157 N. Y. 672, 51 N. E. 1091; *Wood v. Hubbard* (1898) 29 App. Div. 166, 51 N. Y. Supp. 526; *People's Trust Co. v. Flynn* (1904) 44 Misc. 6, 89 N. Y. Supp. 706, reversed on another ground in (1905) 106 App. Div. 78, 94 N. Y. Supp. 436; *Re Watts* (1920) 112 Misc. 300, 182 N. Y. Supp. 910.

NORTH CAROLINA.—*James v. Masters* (1819) 7 N. C. (3 Murph.) 110; *Doe ex dem. Hoyle v. Stowe* (1830) 13 N. C. (2 Dev. L.) 318; *Ford v. Whedbee* (1834) 21 N. C. (1 Dev. & B. Eq.) 16; *Dunlap v. Ingram* (1858) 57 N. C. (4 Jones, Eq.) 178.

OHIO.—*Cranè v. Doty* (1853) 1 Ohio St. 279.

PENNSYLVANIA.—*Hitchcock v. Hitchcock* (1860) 35 Pa. 393; *Ellis's Appeal* (1888) 10 Sadler (Pa.) 126, 13 Atl. 905; *Thistle's Estate* (1919) 263 Pa. 60, 106 Atl. 94; *Miller v. Wilson* (1859) 3 Phila. 343; *Zerbe v. Zerbe* (1875) 2 Legal Chron. 311, as found in 10 B. R. C.

49 Century Dig. col. 1414; *Gorgas's Estate* (1893) 3 Pa. Dist. R. 360; *Habecker's Estate* (1910) 43 Pa. Super. Ct. 86.

SOUTH CAROLINA.—*Snelgrove v. Snelgrove* (1812) 4 S. C. Eq. (4 Desauss.) 274; *Gordon v. Blackman* (1844) 18 S. C. Eq. (1 Rich.) 61; *Blackman v. Gordon* (1845) 19 S. C. Eq. (2 Rich.) 43, 44 Am. Dec. 241; *Crossby v. Smith* (1851) 24 S. C. Eq. (3 Rich.) 244; *Vaughan v. Langford* (1908) 81 S. C. 282, 128 Am. St. Rep. 912, 62 S. E. 316, 16 Ann. Cas. 91.

TENNESSEE.—*Bradford v. Leake* (1910) 124 Tenn. 312, 137 S. W. 96, Ann. Cas. 1912D, 1140.

TEXAS.—*Philleo v. Holliday* (1859) 24 Tex. 38.

VIRGINIA.—*Boisseau v. Aldridge* (1834) 5 Leigh, 222, 27 Am. Dec. 590; *Coffman v. Coffman* (*Coffman v. Heatnole*) (1888) 85 Va. 459, 2 L.R.A. 848, 17 Am. St. Rep. 69, 8 S. E. 672.

WEST VIRGINIA.—*Coberly v. Earle* (1906) 60 W. Va. 295, 54 S. E. 336.

ENGLAND.—*Denn ex dem. Gaskin v. Gaskin* (1777) Cowp. pt. 2, p. 657, 98 Eng. Reprint, 1292; *Pugh v. Goodtitle* (1787) 3 Bro. P. C. 454, 1 Eng. Reprint, 1429; *Pickering v. Stamford* (1797) 3 Ves. Jr. 492, 30 Eng. Reprint, 1122; *Fitch v. Weber* (1848) 6 Hare, 145, 67 Eng. Reprint, 1117, 12 Jur. 645, 17 L. J. Ch. N. S. 361; *Sykes v. Sykes* (1867) L. R. 4 Eq. 200, L. R. 3 Ch. 301, 37 L. J. Ch. N. S. 367, 16 Week. Rep. 545; *Re Holmes* (1890) 62 L. T. N. S. 383.

NEW SOUTH WALES.—*Muir v. Archdall* (reported herewith) ante, 559.

He may, however (as pointed out by Kay, J., in *Re Holmes* (1890) 62 L. T. N. S. 383), put an heir or next of kin to his election by giving such a one part of his estate and saying that such gift is the only part which such one shall take.

And, as pointed out in *Muir v. Archdall*, the express exclusion of one of several who would otherwise take may amount to an implied gift to the others, so that there is no actual intestacy. The courts, however, are very reluctant to treat the words of exclusion as a sufficient basis for implying such a gift. While this view may be proper where an intestacy results from the lapse or failure of some disposition made by the will, its propriety is not so apparent where there is an intestacy on the face of the will. But little attention has been paid to this possible distinction.

In *Boisseau v. Aldridge* (1834) 5 Leigh, 222, 27 Am. Dec. 590, it is said that if in every case in which a testator declares an intention to exclude his heirs, or any one of them, it is to be implied from that alone that he intends to devise away his estate from such excluded person or persons, the principle that to disinherit his heirs a decedent must give his estate to somebody else would be of no con-

sequence, since it would give effect to the simple disinherison by holding it tantamount to a positive disposition.

The right of a person to disinherit his heir exists not as a distinct or abstract substantive power, but merely as a consequence of the power of giving his estate to others. *Bradford v. Leake* (1910) 124 Tenn. 312, 137 S. W. 96, Ann. Cas. 1912D, 1140.

A will cannot operate to exclude the heir at law from taking, where the will itself is void. *Henriques v. Yale University* (1898) 28 App. Div. 354, 51 N. Y. Supp. 284, appeal dismissed in (1899) 157 N. Y. 672, 51 N. E. 1091.

It is enough, however, to take the case out of the rule that words of exclusion are ineffectual unless the property is given to someone else, that testator disposes of it by reference to the Statute of Distributions.

Thus, in *Hayes v. Davenport* (1853) 25 Vt. 109, it is held that persons who would otherwise have taken are effectually excluded from participation in the residuary estate by a direction that the legacies to them are to be "in full of all and for all other provisions by me made for them in any will or codicil by me made, hereby revoking all other provisions by me heretofore made for such children," though testator merely directed his residuary estate "to be disposed of in accordance with the laws of this state."

And in *Re Taylor* (1885) 52 L. T. N. S. 839, a bequest upon trust "to such person or persons as under the Statute for Distribution of the estates of intestates shall, exclusive of my said daughter [naming her] and of my said grandchild [naming her] and her issue, if any, then be my next of kin," was held effectual as a gift to a class composed of testator's next of kin other than the daughter and the grandchild.

II. Restrictive words in connection with gift as putting legatee to an election.

Where the testator, instead of excluding persons who in case of intestacy would be entitled to participate in his estate, accompanies a provision for such persons with some restrictive expression importing that he shall have so much and no more, it may be a question whether such expression operates to put the legatee to an election whether to take the provision made for him by the will or his share under the Intestate Law. Such provisions, however, are generally taken as referring to property passing by the will and not to the property passing under the Intestate Law.

A daughter is not excluded from participation in the residue undisposed of by the will, by a provision therein that she "shall have no more than" certain property given her by the testator. *Denson v. Autrey* (1852) 21 Ala. 205.

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A gift to one "as his full portion" of the testator's estate will not preclude the devisee from the participation which the law of the Statute of Distribution gives him in intestate property. *Ward v. Todd* (1886) 41 N. J. Eq. 414, 5 Atl. 650.

In *Bell's Estate* (1890) 8 Pa. Co. Ct. 454, a codicil by which a testatrix referring to a certain legacy given by her will proceeded to "order and declare that my will is that only the sum of \$1 each shall be given to [the legatees] as the full amount of their share, and that the residue of the said legacy be given to my son E. C. Bell's children," was held not to exclude the legatees from participating in the distribution of intestate property, the words of exclusion having reference to legacies only.

In *Sympson v. Hutton* (1716) 11 Vin. Abr. 185, pl. 16, and *Pickering v. Stamford* (1797) 3 Ves. Jr. 332, 30 Eng. Reprint, 1038, a gift by testator to his wife of certain property in bar and full satisfaction and recompense of all dower or thirds which she might have or claim in, out of, or to, all or any part of his real and personal estate, or either of them, was held not to prevent the widow from taking under the Statute of Distribution a share in property not effectually disposed of by the will.

In *Norcott v. Gordon* (1844) 14 Sim. 258, 60 Eng. Reprint, 357, it was held that a widow to whom testator had given an annuity in lieu of dower, thirds, or other claims or demands which she might otherwise have upon his estate, was not bound to elect between the annuity and a copyhold of inheritance which the testator failed to dispose of, inasmuch as any release of her claims and demands would only allow the land to descend to her.

In *Tavernor v. Grindley* (1875) 32 L. T. N. S. 424, a gift to a widow of an annuity "in lieu of all dower and claim that my said wife may have on all or any part of my estate or effects" was held not to exclude her from participation in undisposed-of personalty.

In *Naismith v. Boyes* [1899] A. C. 495, where testator made a provision for his wife which he declared to be in full of all claims by her, and through the death of the devisees before vesting took place the residue fell into intestacy, it was held that the declaration was to be construed as excluding the widow's claim in so far only as conflicting with the will, and, an event having happened which the testator never contemplated, the widow was entitled both to her provision and to the rights given her by law in such of the property as had fallen into intestacy.

But in *Lett v. Randall* (1855) 3 Smale & G. 83, 65 Eng. Reprint, 572, affirmed in (1860) 2 DeG. & J. 388, 45 Eng. Reprint, 671, a bequest to a widow "in full and entire lieu, bar, recompense, discharge, and satisfaction of and for all and all manner of claims and demands whatsoever which she at any time might or could have, or

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which, without provision and declaration, she could or might have at the time of my decease, of, into, or out of any part or parts of my real or personal estate," was held to exclude the widow from participation in property as to which there was an intestacy on the face of the will, the Vice Chancellor saying: "It is a material circumstance that the representative of the widow claims her distributive share in property as to which there was an intestacy on the face of the will. It is not a case like *Pickering v. Stamford*, in which the claim was made in respect of property actually disposed of by the will, which became distributable through an unforeseen accident. This distinction was one great ground of the argument and of the decision in *Pickering v. Stamford*. Another important circumstance is that the language in this will, which purports to exclude the widow from any further part or share, is very comprehensive. The £1,200 a year is given to her in satisfaction of all claims and demands which, without provision or declaration, she might have at the time of his decease in respect of any part of his estate and effects. In *Pickering v. Stamford*, as well as in *Sympson v. Hutton*, on the authority of which *Pickering v. Stamford* seems to have been decided, the testator, after having declared by will that the widow was to have no further part or share, so far revoked that declaration and intention as to give by codicil a further provision for the widow, without repeating or referring to the words of exclusion. In the present case, the words of exclusion being in comprehensive terms, the testator himself adhered to that intention to the last, and made no further gift to the widow by any codicil. If the testator had declared that the widow was to be entitled to the annuity of £1,200 a year only on the terms of her giving to his executors a general release of all right to any share in any other part of his estate, whether accruing by intestacy from any unforeseen accident or otherwise, there would seem to be no room for argument in favor of the widow's claim to any distributive share. If that view be correct there seems little difference between such general and comprehensive words of exclusion as occur in the present case, and a proviso that she should execute a release. Lord Eldon, in *Garthshore v. Chalie* (1804) 10 Ves. Jr. 1, 32 Eng. Reprint, 743, forcibly noticed the distinction between the intention of an absolute exclusion from any further share which may accrue under any circumstances and the intention to bar her from her thirds for the sake of persons under that instrument to take the residue. If that be the principle of the decision in *Pickering v. Stamford*, it cannot apply to a case where, on the face of the will, there is an intestacy as to a great part of the estate, and the words of exclusion from any further share are absolute, general, and comprehensive."

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A legacy or devise to one who is an heir at law or a statutory heir will not prevent him from taking as heir at law or as a statutory heir in case of a partial intestacy unless it is manifest from the whole will that there was an intention to exclude him. *Bragg v. Litchfield* (1912) 212 Mass. 148, 98 N. E. 673.

A bequest to the husband of the testatrix of a specified amount of property does not deprive the husband of his statutory right in property left undisposed of. *McDougald v. Gilchrist* (1884) 20 Fla. 573.

In *Kaser v. Kaser* (1913) 68 Or. 153, 137 Pac. 187, it was held that a widow's acceptance of a provision in the will for her benefit (which, however, was not expressed to be in lieu of her dower or statutory rights), by which she was given the use of all testator's property for life, did not thereby waive her right to insist upon the share of the intestate property which she was given by statute.

III. Instances in which gift to others has been implied.

In *Lett v. Randall* (1855) 3 Smale & G. 83, 65 Eng. Reprint, 572, affirmed in (1860) 2 De G. & J. 388, 45 Eng. Reprint, 671, it was said that although a clause of exclusion extending to all the next of kin would be nugatory, as then there would be no one in whose favor the exclusion could operate, yet where it has a limited operation, so as to give a benefit to another person, it will be valid, the exclusion by declaration as to one or some only of the next of kin having the same effect as a gift by implication to the rest of them of the share of those who are excluded.

And in *Doe ex dem. Hoyle v. Stowe* (1830) 13 N. C. (2 Dev. L.) 318, however, it is said with reference to the rule that an heir cannot be disinherited by words of exclusion only: "Manifestly, however, this rule can only apply where there is a single heir. He cannot be barred by words of exclusion barely; because if he takes not there is nobody else that can. When there is a class of heirs the exclusion of one leaves others who may take. The necessity which imposes the estate on a single heir, for the want of another owner, ceases when there are more heirs. Whether these words operate simply to exclude him and leave the land to descend to the others, or operate by implication as a disposition to the others, is an inquiry more nice than useful. I suppose the latter, like the case in the books of a devise to the heir after the death of the testator's widow which is held to give a life estate to the latter. Be it the one way or the other, the exclusion is effectual because the estate is not left without an owner. This is the doctrine touching the succession of the next of kin to the personalty. The same reason extends it to our partible inheritances; for, although an heir is favored, yet he

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may be shut out by a reasonable implication short of a necessary one."

In *Rund v. Green* (1879) 12 Ch. D. 819, where testator, in connection with gifts to various of his relatives, expressed his intention that neither they nor their children should take or enjoy any benefit of his property other than that specifically given them, and also declared that such persons "shall not, nor shall any or either of them, be entitled to take any part of my real estate, nor any share or proportion in the distribution of my personal estate of which I may happen to die intestate, or not have fully disposed of, either in the character of my heir or heiresses at law or as my next of kin, but shall be wholly excluded therefrom in the same manner as if they had all died in my lifetime," it was held that the declaration of the testator amounted to a gift in favor of those persons who take by law upon a distribution of personalty under the statute, but excluding the persons specified, and not including those who would come within the description of persons who would take under them.

In *Vachell v. Breton* (1706) 5 Bro. P. C. 51, 2 Eng. Reprint, 527, also reported under the name of *Vachell v. Jeffereys*, in Pree, in Ch. 169, 24 Eng. Reprint, 82, 2 Eq. Cas. Abr. 435, c. 17, 22 Eng. Reprint, 371, where testator by his will gave to W and C, whom he called his wife's children, not owning them to be his, 10 shillings apiece, "and no more," and to the children which he did own, considerable legacies, and made no disposition of the surplus of his personal estate, it was held that such surplus should be divided in the same manner as was appointed by statute for settling intestate's estates, except that said W and C were to be excluded. This decision has been variously interpreted, in some cases as giving effect to words of exclusion in the will, and in others as excluding W and C from participation because of the doubt as to their legitimacy.

In *Re Hayne* (1913) 165 Cal. 568, 133 Pac. 277, Ann. Cas. 1915A, 926, it was held that a son was effectually excluded from participation in a residuary gift lapsing by reason of the death of the beneficiary in the lifetime of the testatrix, by a provision in the will by which she declared that such son "has received already more than what would be his share in my estate, and therefore I leave to him nothing by this my last will, and declare that he has now no interest in my property and estate," where, after the death of the residuary legatee, the testatrix, with knowledge thereof, made a codicil, in which, after altering certain bequests, she declared: "I further declare that the statements made in my said will other than those in relation to the said trust are hereby confirmed, ratified, and approved."

In *Clarkson v. Clarkson* (1871) 8 Bush, 655, a will evincing an intention on the part of the testator to dispose of his whole estate, 10 B. R. C.

and providing that "as to the remainder of my landed estate, I make no further provision for, more than it is my will and desire that my son, Jesse N. Clarkson, and my grandchildren by my daughter Lucy and Luther J. Talbott, shall be deprived of any interest whatever therein," was construed as devising land not specifically disposed of to his heirs at law, except his son Jesse and the children of his daughter Lucy.

In *Tabor v. McIntire* (1881) 79 Ky. 505, where testatrix, having a brother and sister and nephews and nieces of predeceased brothers, left a holographic will in the following language: "For sundry reasons and bad treatment it is my will and wish that Boone Tabor shan't have any of my property, and Thomas McIntire only through a responsible trustee in the way of clothes and something to keep him from suffering," such will was held to amount to a devise of her property to her heirs at law with the exception of Boone Tabor.

But in *Todd v. Gentry* (1901) 109 Ky. 704, 60 S. W. 639, it was said that *Tabor v. McIntire*, *supra*, is irreconcilable with the subsequent case of *Phillips v. Phillips* (1892) 93 Ky. 498, 20 S. W. 541.

In *Allen's Succession* (1896) 48 La. Ann. 1036, 55 Am. St. Rep. 295, 20 So. 193, a will stating that "my three nieces [naming them] has received each \$500, I will that they receive \$500 more in cash and have no interest in any other claim," was held effectual to exclude them from participation in the residuum of the estate, as to which the testator died intestate, the court saying: "They could have no interest in any claim given to other legatees. They could possibly lay claim to nothing else than the residuum of the estate. The testator must have referred to this, for there is no other fund upon which the legatees could assert any right."

In *Hurst v. Von De Veld* (1900) 158 Mo. 239, 58 S. W. 1056, a will evincing an intention to dispose of testator's entire estate and distributing it among the natural objects of his bounty, giving to the children of deceased children a fractional share of "the interest of" their parents in his estate, explaining that he meant by such expression "their interest that they would inherit by law after taking out the specific bequest and devises made by me in this will to others named herein," was held to amount to a complete disposition of testator's property, and so to restrict to the sum mentioned a daughter to whom he bequeathed a note and the sum of \$50 "of my estate and no more."

IV. Instances in which existence of implied gift to others is negatived.

The unwillingness of the courts to treat words of exclusion as a basis for implying a gift to those who would take in case of intestacy, except the person excluded, is illustrated by the following decisions:

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A provision that "those of my children that I have heretofore given portions to shall have no part or portion in the estate that I may die possessed of [naming them] except what shall be especially pointed hereafter out," will not exclude such children from participation in property not disposed of by the will. *Haralson v. Redd* (1854) 15 Ga. 148.

A provision in a will reading: "Having fully provided for my deceased daughter, Roxy Ann . . . in her lifetime, and having advanced to her in lands and money a portion equal to the share given to each of my said children in this will, I make no provision or bequest to her children," does not exclude such children from participation in a portion of the estate as to which there proved to be an intestacy. *Lane v. Patterson* (1912) 138 Ga. 710, 76 S. E. 47.

A son of testator is not prevented from participating in property as to which there is an intestacy by reason of the invalidity of the provisions of the will, by a declaration therein that, for reasons given, "it is my express wish and desire that he shall have nothing whatever from my estate." *Lawrence v. Smith* (1896) 163 Ill. 149, 45 N. E. 259.

Bequests to divers of testator's children of \$1, to be their full share of his estate, are ineffectual to exclude them from participation in the distribution of property as to which he died intestate. *Parsons v. Millar* (1901) 189 Ill. 107, 59 N. E. 606.

A testamentary provision reading: "It is my wish that my son [naming him] is not to have any more out of my estate than the land described, as I consider it a big share of my estate, both real and personal," does not bar such son from participation in intestate realty. *Ames v. Holmes* (1901) 190 Ill. 561, 60 N. E. 858.

Heirs are not excluded from participation in intestate property by a declaration, accompanying a gift to them of \$5, that they "shall have no other share of my estate or claim upon the same." *Tea v. Mullen* (1913) 257 Ill. 624, 45 L.R.A.(N.S.) 1163, 101 N. E. 209.

A will by which testator gave his wife a life estate in certain lands, and certain personal property absolutely, and directed that all the rest of his personal property be sold, "and the proceeds divided among my lawful heirs equally, except my son Ambrose E. Thomas. To him I will \$25 only of my real and personal property in addition to the amount I have already advanced him," does not operate to exclude such son from participation in the reversion of the realty given to the widow for life, which the will failed to dispose of. *Thomas v. Thomas* (1886) 108 Ind. 576, 9 N. E. 457.

In *Andrews v. Harron* (1898) 59 Kan. 771, 51 Pac. 885, it was held that a declaration, accompanying a provision for testator's mother, that it should be in full of all claims she might have in his

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estate, and that she should not inherit any part of the estate by right of descent or otherwise, did not preclude the mother from taking property as to which the son died intestate, where she was his sole heir, the court saying: "Such declaration must be regarded as nugatory unless the estate which the law gives to the parent is in terms disposed of to someone else. The will does not provide that the estate from which it seeks to exclude the mother shall go to any specifically named person. It does not provide that it shall go to those who would inherit if his mother were dead. Albe M. Saxton [the testator] left no heirs except his mother. She was the sole inheritor of his property in this state. If effect is to be given to that provision of the will which undertakes to exclude her from the inheritance, who, then, is entitled to the property? None of the parties are entitled to it under the will, because to none of them was it devised. None of them are entitled to it under the statute, because the statute gives it to them only through [the mother] and upon her death. Effect may be given probably to terms of exclusion of one or more persons who stand in equal right with others under the Statute of Descents. For instance, if the father of Albe M. Saxton had been living, it might be that the exclusion of his mother would have operated to vest the estate wholly in his father."

In *Phillips v. Phillips* (1892) 93 Ky. 498, 20 S. W. 541, where testator devised to his five daughters \$200 each, which sum he stated to be "all I intend for my five daughters to have of my estate," and to all of his sons, except two, to whom he made no gift or devise, he gave by deed small portions of land, saying in each deed that the land given was all he intended the donees "to have out of his estate." it was held that there was no implied devise to the two sons of the portion of the estate not directly disposed of by the will and deeds, but that as to such estate there was an intestacy, and consequently that the sons and daughters for whom provision was made were not excluded from participation therein.

In *Todd v. Gentry* (1901) 109 Ky. 704, 60 S. W. 639, a will by which testator gave to his father \$2 in gold, with a direction that an inscription should be placed thereon that it is his interest in the son's estate, was not effectual to exclude his father as heir at law from all interest in property which was not disposed of by will.

A bequest to a daughter and her husband "in full of their part of my estate" is ineffectual to exclude the daughter from participation in property not disposed of by the will. *Walters v. Neafus* (1910) 136 Ky. 756, 125 S. W. 167.

A recital in a will, "I have gave it to my son Henry Duff's heirs [certain property] it being his full share of my whole estate," is not effectual to exclude such son from participation in property not disposed of by the will. *Duff v. Duff* (1912) 146 Ky. 201, 142 S. W. 242.

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In *Stewart v. Pattison* (1849) 8 Gill, 46, the addition of the words "and no more of my estate" to legacies given to several of testator's children was held not to give the residue of the estate, as to which no provision was made by the will, by implication, to the other children to whose legacies no such restriction was annexed. The court said: "We do not think that this a reasonable or safe construction of wills, in this respect, like this. In the first place, a bequest to the other children is a bequest expressly of so much, and impliedly of no more, to them. In the next place, the law does not conclude that, because a man has determined to disinherit one child, he means that all the rest should be his residuary legatees. This act of disinheriting a child (leaving him or her, so far as it depends upon his or her father, utterly destitute) is one which the law cannot regard very favorably. If the will be so explicit that it must be so, let it be so; but if it must be done, it must because the testator has expressly declared it; not because he may, as well as may not, have intended it. It may be that he used those words in the expectation that a child's share of the undisposed residue would be, in his opinion, a sufficient provision for that child, and simply for that reason gave to such child no more by will. If such was the necessary effect of annexing the words 'no more' to a devise or bequest, then all the children might be disinherited, unless there chanced to be one of them who was unnoticed altogether in the will. These words may be rejected as surplusage, a process not usual in construing wills. They evidence an intent, but a mere intention will not defeat these children."

In *Torrey v. Peabody* (1902) 97 Me. 104, 53 Atl. 988, the fact that testator limited his wife to a life estate by a will by which he gave her the use and income of all his property during her life, with power to use so much of the principal as should be necessary for her comfortable support, and made no other disposition of his estate, was held not to raise an implication that he intended the remainder of the personal estate to go to the other persons entitled to take by the Statute of Distributions, to the exclusion of his widow.

In *Zimmerman v. Hafer* (1895) 81 Md. 347, 32 Atl. 316, where testator stated: "Whereas I have this day made and executed a deed conveying to J. Monroe Zimmerman the farm whereon I now reside, I do hereby give and bequeath unto him the said James Monroe Zimmerman all my personal property of whatever description and wheresoever situate. I thus give to the said J. Monroe Zimmerman all my property and estate because he is married to my niece and I have been living with them for many years and have a high regard and affection for them and desire that they shall enjoy the same to the exclusion of my other relatives," and Zimmerman failed to establish title to the farm under the deed of gift, it was held that

the expressed desire that the testator's other relatives should be excluded from participating in the distribution of his estate was ineffectual to raise a devise by implication to Zimmerman.

In *Nickerson v. Bowly* (1844) 8 Met. 424, the fact that testator gave the whole of his personal property to his wife for life was held not to preclude her from taking one half thereof absolutely under the Statute of Distributions, and that a gift thereof to his other heirs could not be implied, the court saying: "A gift by implication must be founded upon some expressions in the will from which such intention can be inferred. It cannot be inferred from an absolute silence on the subject. It may be admitted in a popular sense that, when a deceased person has given a part of his property to one object of his bounty, he had no intention that such person should take another portion. But we think the true answer is that the intention of the testator is to govern so far only as he has communicated that intention by his will, either in terms or by implication; but if he has left undevise property, the disposition of it is not governed by his will, but by another rule having its origin in another source, in the application of which the intent of the testator is not the governing rule, and can have no influence. It operates in the same manner as if the deceased had left no other property and made no will. If, therefore, the intent of the testator not to give the remainder to the same person could reasonably be inferred from a gift of personal property to one for life, in terms, it could have no effect in regulating the disposition of intestate property. If, however, it were thought important to inquire into the intent of the deceased, when he has made a will, but left property undisposed of, either in terms or by implication, as every man is presumed to know the law, it may reasonably be inferred, as his intention, that the residue should be disposed of according to law."

A bequest of "\$1, and no more," to an heir at law, will not prevent him from participating in property undisposed of by the will. *Wells v. Anderson* (1899) 69 N. H. 561, 44 Atl. 103.

A provision in a will giving to testator's son his note in addition to a sum of money previously given him, and stating, "I do not therefore give him any further portion of the farm aforesaid divided as above directed," does not exclude the son from participation in property as to which the testator died intestate. *Linell v. Linell* (1870) 21 N. J. Eq. 81.

In *Graydon v. Graydon* (1874) 25 N. J. Eq. 561, a provision in a will that if one of testator's sons should marry a certain person described, before a certain date, the executors should dispose of the share given him as if such son were dead in the lifetime of the testator, intestate, and without issue, but subject in other things to the provisions of the will, was held not to operate to exclude the son
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from participating as heir at law and next of kin in the estate as to which the testator died intestate.

A will by which testator directed his estate to be invested for the support of his widow and children not of age or married, and, on the marriage of his four daughters, to be equally divided, and a share settled on each of them for their lifetime "all and except \$1 each to my two sons, trusting that they will follow my example of industry to gain what they may require," was held not to exclude the sons from participation in the remainder. *Barlow v. Barnard* (1893) 51 N. J. Eq. 620, 28 Atl. 597.

A will declaring as to one legatee that the amount of a legacy to her of \$2,000 "shall be in lieu of all interest to which she may be entitled in my estate by virtue of this will or otherwise . . . my intention being that said Elanor Lynch shall not receive more than \$2,000 of my estate under any circumstances," and as to another legatee: "I consider she has received all she is entitled to, as I consider her share is equal to the other children," does not exclude such legatees from participation in intestate property. *Nagle v. Conard* (1911) 79 N. J. Eq. 124, 81 Atl. 841, affirmed on opinion below in (1912) 80 N. J. Eq. 253, 86 Atl. 1103.

The distribution of such part of a testator's estate as is not legally devised and bequeathed amongst his heirs and next of kin is not affected by a declaration in his will "that any relative or relatives of mine not named in this last will and testament shall, under no circumstance, have any part of my estate unless" as heir of some other beneficiary. *Re Trumble* (1910) 199 N. Y. 454, 92 N. E. 1073.

A declaration that a child shall not under any circumstances inherit or receive any portion of testator's real or personal estate is ineffective to prevent such child from taking by inheritance. *Wood v. Hubbard* (1898) 29 App. Div. 166, 51 N. Y. Supp. 526.

A statement in a will that no provision is made "for the children of my dear son George, because they will be amply provided for otherwise," is ineffective to prevent them from sharing in a portion of the estate as to which there is an intestacy. *Re Watts* (1920) 112 Misc. 300, 182 N. Y. Supp. 910.

An expression following a gift to a son, "all of which will include all and every part of my estate intended, meant, and allotted to him, as the whole of his portion thereof," and an expression in connection with a gift to a grandson, "all of which is to complete his share of my estate, unless the death of some one or more of his connections should entitle him to heir from them," will not operate to exclude such son and grandson from participation in an undisposed-of residuum. *Ford v. Whedbee* (1834) 21 N. C. (1 Dev. & B. Eq.) 16.

In *Dunlap v. Ingram* (1858) 57 N. C. (4 Jones, Eq.) 178, in which it was a question whether legacies given to persons who were 10 B. R. C.

among testator's next of kin as their "full share of my estate" operated to exclude them from participation in the distribution of an undisposed-of residuum, the court said: "It was admitted in the argument that the exclusion of all the next of kin would not defeat them of the surplus, though it was said the exclusion of one among two or more would be effectual as to that one. Now, the ground on which the next of kin take, in the first case, is that the testator has left the surplus undisposed of, and they must take, because there is no one else who can. Then, it is plain, they take by the law, and not by the will. The same reason applies as directly and conclusively where there is an exclusion of one of several next of kin, and the contrary doctrine is absolutely inconsistent with the nature of the fund, which is a residue undisposed of,—not touched by the will, and left to the law alone. If, then, the exclusion of one be effectual, it must be because, by reason of the exclusion, there is a gift by implication to the other next of kin, and they take as general residuary legatees. The interpolation of such a general residuary clause upon implication is inadmissible upon any proper principle of construction. Such an implication could only be justified upon the clearest intention; and in this case, it is plain, the testator thought he had given away all his estate, and the partial intestacy arises, as it generally does, from a defect in one of the dispositions from which a surplus arises, which was not in his contemplation, and about which he had, therefore, no particular intentions."

An express declaration by a testator that a son "shall not receive any part of my estate" will not debar such son from sharing as one of his father's next of kin in the distribution of any property as to which his father may have died intestate. *Rauchfuss v. Rauchfuss* (1883) 2 Dem. 271.

In *Crane v. Doty* (1863) 1 Ohio St. 279, the court, holding that words of exclusion cannot be taken as a devise by implication to testator's other heirs, said: "It is admitted by the defendant's counsel that the decisions in England are all against them upon this point; but they insist that those decisions have their foundation in the disposition of the English courts to favor the law of primogeniture; and for a still stronger reason, that the exclusion of the heir operates an exclusion of all who could claim the estate only through him, and would, therefore, leave no one capable of taking during his life. These considerations, they insist, have no application here; and that effect can consistently be given to the words of exclusion in the will of Doty, by allowing the estate to descend to his other children, excluding Serepta, or by raising an estate by implication in their favor to this residuum. In support of this position, they refer us to *Doe ex dem. Hoyle v. Stowe* (1830) 13 N. C. 10 B. R. C.

(2 Dev. L.) 318; and it must be admitted that this case is in point to sustain them. They also concede that this is the only American case they have been able to find in point upon the subject. The first inquiry is, Can Serepta be excluded and the other heirs take this property by descent? It may be that the considerations alluded to have had influence with the English courts; but, aside from them, an insurmountable obstacle exists to giving an affirmative answer. The property must be disposed of upon the death of the owner. It may be disposed of by will; but if it is not, the law disposes of it to all the children alike. All dominion of the owner over it ceases with his life. To allow a testator to leave his property undisposed of, and by will to control the course of descent and distribution, would be to allow him to repeal the law of the land. It must go by devise or descent; and in either mode it goes entirely uncontrolled by the other; and it is impossible to conceive of an estate created by a mixture of the two. This being impossible, the next inquiry arises, Can the other children take this property under the will by implication? The general principle upon this subject is thus stated by Mr. Jarman: 'The heir is not to be disinherited unless by express words, or by necessary implication; and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed.' 1 Jarman, Wills, 465. 'Conjecture is not permitted to supply what the testator has failed to indicate; for, as the law has provided a definite succession in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of anyone, not pointed out by the testator with equal distinctness.' 1 Jarman, Wills, 315. From a careful examination of all the authorities within our reach bearing upon this question, we are led to the conclusion that, in order to raise an estate by implication, the two following circumstances must concur: First, an interest or estate in the property, less than the whole, must be created expressly by the will, in order that it may appear that the testator had the disposition of the property in his mind; second, the person to take by implication must be named or described in connection with the raising of such interest or estate. The familiar example put in the elementary books is a devise of lands by a man to his heir after the death of his wife. Here an evident intention appears to postpone the heir until the death of his wife, and she will, therefore, take a life estate by implication. But if the devise were to a stranger, instead of the heir, the same implication would not arise, for it would not sufficiently appear that he did not intend the heir to take the estate in the meantime. Indeed, it is always a question of intention to be derived from the words of the will; but it must appear from the will that the testator has attempted to dispose of the property, and in such disposition has

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used the name of the person to take by implication, so as to render it at least highly probable that he intended such person to take the interest in the same property that he has not disposed of by words. We find these requisites entirely wanting in this case. No attempt to create any interest or estate in this property is found in this will. Not the most distant allusion is anywhere made to it, or to the persons that he desires to take it. Under such circumstances, to infer an intention to dispose of it by devise would be to substitute the blindest conjecture for probability, and, in effect, to make a disposition for the party when he has attempted to make none for himself."

A devise to a daughter, "to be her full share and interest in all my estate," does not preclude her from sharing in property as to which, by reason of the lapsing of a legacy, there was an intestacy. *Leopold v. Warner* (1920) 9 Ohio App. 379.

A statement in a will: "I entertain a feeling of love and affection for my niece Susan Gorgas of Westchester, and my sole reason for not making her a legatee under this will is the fact that she is already in receipt of a large income derived from her father's and uncle's estates," will not preclude the niece from taking under the intestate laws a share of the residue which lapsed by reason of the death of one of the residuary legatees. *Gorgas's Estate* (1893) 3 Pa. Dist. R. 350.

In *Habecker's Estate* (1910) 43 Pa. Super. Ct. 86, it was held that a clause in a will by which testatrix gave all her estate to a sister for life and after her death created an active trust as to three tracts of land, which was to continue until the death of all of certain grandnephews and grandnieces, and provided for its distribution at their death, that "Benjamin H. Bender, a nephew, and his family are not to participate in the distribution of my estate for reasons well known to them," could not be taken as a bequest to the next of kin other than the nephew, of property not otherwise disposed of by the will.

A bequest by a father of 5 shillings apiece, "and no more," to several of his children, will not exclude them from a distributive share in the undisposed-of residuum. *Snelgrove v. Snelgrove* (1812) 1 S. C. Eq. (4 Desauss.) 274.

In *Seabrook v. Seabrook* (1841) 16 S. C. Eq. (McMull. Eq.) 201, a declaration in a will that the provision therein made by the testator for his wife should be "in lieu and bar and full satisfaction of and for all her dower and thirds of or in all or any part of my goods and chattels, lands, tenements, and hereditaments, and whatsoever else she may in any manner claim and demand of, in, or out of, any of my estate, real or personal," was held not to exclude the widow from taking as an heir of the testator a share in property not effectually disposed of by his will.

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In *Crossby v. Smith* (1851) 24 S. C. Eq. (3 Rich.) 244, where testator directed "the remaining part of my property" (after a life estate in his wife and some small legacies) "to be equally divided at my wife's decease, among all my children," adding: "One reserve, I wish my executors to enforce, that is, if either of my lawful heirs should die leaving issue behind them, before a distribution should take place as I have before mentioned, for their issue or heirs not to come in for their parent's share of my property," it was held that the last-quoted provision was ineffectual to prevent the issue of deceased children from participating in the distribution of property as to which there was an intestacy.

A bequest to a wife of a life estate does not affect her right to come in under the statute for her share in the remainder after the determination of the life estate. *Philleo v. Holliday* (1859) 24 Tex. 38.

In *Boisseau v. Aldridge* (1834) 5 Leigh, 222, 27 Am. Dec. 590, an instrument declaring: "Not having made any will so as to dispose of my property, and two of my sisters marrying contrary to my wish, should I not make one I wish this instrument to prevent either of their husbands from having one cent of my estate . . . nor either of them to have one cent unless they should survive their husbands; in that case I leave them . . . \$500 each," was held not to constitute a devise and bequest of the testator's estate by implication to his heirs and next of kin other than the two sisters and their husbands.

In *Coffman v. Coffman* (*Coffman v. Heatnole*) (1888) 85 Va. 459, 2 L.R.A. 848, 17 Am. St. Rep. 69, 8 S. E. 672, a will by which testator declared: "It is my will that my son William H. Coffman be excluded from all of my estate at my death and have no heirship in the same, he having become the heir to his mother's interest in her father's estate, and I, his guardian, have paid him and am now about to make a final settlement with him which will make as much to him and probably more than my estate will pay to each of my other legal heirs," and containing no other disposition of testator's property, was held not to amount to a bequest by implication of testator's property to his heirs and next of kin other than his son William. The court said: "He does not say his 'other legal heirs' are to have the estate, but that his eldest son is not to have any part of it. And from this we are asked to imply that he intended to give, and consequently, as a legal conclusion, to hold that he did give, the whole of his estate to his other children; in other words, to hold that the reason assigned for wishing to exclude one of the children operates a disposition of the estate to the other children. But this view is contrary to the plainest principles of the law, as we have already seen; for the question is, not what the decedent intended, 10 B. R. C.

but what has he said; not what he may have thought would be the result of what he wrote, but what is the legal effect of the paper. And although he may have intended to dispose of his estate, yet if he has not said so with legal certainty we cannot alter or add to his words, but our judgment must be, as Lord Mansfield's was in *Denn ex dem. Gaskin v. Gaskin*, *quod voluit non dixit*; for we sit here not to make wills, but to construe them; not to make law, but to administer it. It is quite probable the paper was written by the decedent under the erroneous impression that if he would declare his intention to exclude the appellant in the form of a will, the Statute of Descents and Distributions would step in and do the rest; *i. e.*, that it would in effect make a better will for him than he could make for himself, by giving his estate to his other heirs and next of kin, and hence he made no disposition of it. His language, we think, shows this. Had he stopped at the point where he declares the appellant is to have no heirship in the estate, there could be no controversy, notwithstanding the paper, in the introductory part, is called a will. This is conceded, and yet what follows merely shows why he wished to exclude him, which is a very different thing from actually excluding him by disposing of his estate, no matter what his intention was. For in such a case an intention not expressed or clearly manifested is equivalent in law to the absence of a testamentary intent altogether. And herein lies the error of the decree complained of, namely, in giving effect to the intention of the decedent to exclude the appellant by making it tantamount to a disposition of the estate to the other children, which can no more be rightly done than the starting of a person on a journey can be said to be, in legal contemplation, the arrival of such person at the point of destination. And so, here, the decedent, intending to exclude the appellant, started out well enough in that direction, but, unfortunately for the appellees, he stopped before he reached the legal consummation of his purpose. That, in order to effect that purpose, he would have gone further and given his estate in unmistakable terms to his other children, if the necessity for so doing had occurred to him, is also probable, for it is impossible to read the paper in question without perceiving that the thought uppermost in his mind was to exclude the appellant. But the idea that under any circumstances he would have done so rests upon conjecture merely, which is not necessary implication, but the opposite, and can never alone support a devise or bequest."

In *Pugh v. Goodtitle* (1787) 3 Bro. P. C. 454, 1 Eng. Reprint, 1429, a devise "to the rightful heirs of me, the testator, forever, my son excepted, it being my will he shall have no part in my estate either real or personal," it was held, reversing a judgment of the court of King's Bench, that such disposition was ineffectual as a
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gift to the persons who would have been his "right heirs" if he had no son.

In *Johnson v. Johnson* (1828) 4 Beav. 318, 49 Eng. Reprint, 361, where testator directed that his wife and her child Harriet (whom he disclaimed) should be "cut off from any part of my property and shall not receive any benefit or advantage thereby," and directed that his daughter Ann's share be held in trust for her separate use for her life and afterwards for her children, and his son Charles's share should be in trust for him at twenty-one, but made no express disposition of his property, it was held that the widow and her daughter Harriet were not effectually excluded from participation therein.

In *Ramsay v. Shelmerdine* (1865) L. R. 1 Eq. 129, a codicil revoking all provisions of testator's will in favor of a daughter Ellen or her issue in her own right, or by right of survivorship, or in any other manner whatsoever, and making another provision for her in lieu thereof, was held not sufficient to exclude Ellen from participation in the distribution of the share of residue given her by the will, as to which there was an intestacy.

In *Re Holmes* (1890) 62 L. T. N. S. 383, where testator, after various pecuniary bequests, proceeded as follows: "And now revoking and hereby making utterly and forever void and powerless any and all wills by me at any time heretofore by me made and hereby utterly and forever excluding any will and all relatives except my two dear nieces aforesaid . . . from any and all advantages or benefit in this my last will and testament, I hereby lastly . . . appoint my said two dear nieces" and certain other persons as executors and executrices, such provision was held not to amount to a bequest by implication to the nieces, and therefore not to exclude the next of kin from taking property not disposed of.

V. Words of exclusion or restriction as excluding persons mentioned from class to whom the gift is made in another part of will.

Whether words of exclusion or restriction are effective to prevent the persons mentioned from taking under a gift to a class of which he would otherwise be deemed a member is a question the solution of which must depend upon the construction of each particular will. It may be remarked, however, that, as evidenced by the cases herein renewed, the courts have apparently been disposed to give the words of exclusion as broad an effect as possible.

In *Dickison v. Dickison* (1891) 138 Ill. 541, 32 Am. St. Rep. 163, 28 N. E. 792, where testator devised to a son and daughter certain lands "to be in full of their portion of my estate both real and personal," and thereafter directed his residuary estate to be sold and divided, giving to his wife one third part "and the remainder to my

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children in equal portions, share and share alike," it was held that the son and daughter were excluded from participation in the residuary gift.

In *Upshaw v. Sthreshly* (1814) 3 Bibb, 444, where testator, after giving his wife certain property for life, declared that his daughters Sarah and Lucy had received their share of his estate, and then proceeded to give the residue to his other children, adding, however: "If any recovery is had in Kentucky, I give one half of it to my son Edwin and his heirs forever, the other moiety to be equally divided between my other legatees and Lucy," and willed the personal property given to his wife for life, equally between all his legatees, it was held that the testator having expressly named Lucy, as contradistinguished from his legatees, as coming in for a part of certain property, and having shown almost in the commencement of his will that he did not intend to recognize her as among his legatees because he had before provided for her, the just inference was that he did not intend her to share in the property given to his "legatees" upon the death of his wife.

In *Delph v. Delph* (1867) 2 Bush, 171, testator gave his estate upon the marriage or death of his wife to be divided equally among "all my children," naming his daughters only, and adding: "I leave \$50 to my son, George M. Delph, as he has had more than his share." Thereafter the testator noticed a son who was wholly pretermitted in the will, by a codicil, saying: "From a long and troublesome trial with my son Edward and his disobedience towards me, I think it nothing just and right that I shall leave him just I have left George Delph. I leave him \$50 as I have left George on the other side of this paper, and no more than George." By a subsequent codicil he provided that if one of his daughters should never have any children, then at her death "the property is to return to my other children as above named." It was held that, the daughter dying childless, George and Edward had no interest in such share, but that it passed under the will to the four other daughters named therein.

In *Burke v. Milliken* (1898) 69 N. H. 501, 45 Atl. 401, where testator gave his wife the use of certain realty for life, "the said premises upon her decease to become the property of my legal heirs," and his residuary estate to be divided among certain of his relatives named, stating: "To my sister, Harriet M. Wallace, of Boston, and widow and daughters of my deceased brother, Elbridge E. Reed, I devise nothing, because they are well provided for," it was held that the persons last referred to were not entitled to participate in the gift in remainder to testator's "legal heirs."

In *Tisdale v. Mitchell* (1864) 33 S. C. Eq. (12 Rich.) 263, testator gave certain property to his wife during life or widowhood, and
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declared that certain property which he had given by deed to his daughter Susannah and her children, she should have "in lieu of any further share or part of my estate." He then gave to his six children by name parts of his estate, and directed that "should any of my children die before they arrive to age of twenty-one years and without leaving issue, then in that case, their share or part revert back to my estate to be equally divided among my surviving children," and that the remainder or residue of his estate when his youngest child should arrive at the age of twenty-one years, or at the death of his wife, "be equally divided among my children." It was held that the words excluding Susannah could not be construed as limited to an immediate share or part, and therefore that she was not embraced within the description "my children" or "my surviving children."

In *Sullivan v. Straus* (1894) 161 Pa. 145, 28 Atl. 1020, where testator by a will apparently drawn by himself declared: "I now come to the most unpleasant part of my work, that is, the disinheriting of my youngest son, John Russell Sullivan. In consequence of his disobeying my wishes, I wish him to have no interest in profit or principal of any part of my estate whatsoever," and in the next sentence said: "It must be perfectly understood that all of my estate belongs to my children and grandchildren, should any of my children die without issue then their share goes back to my children and their children that are living," it was held that the language excluding John could be given effect only by holding that in the succeeding clause he meant his children other than John.

In *Everitt's Estate* (1900) 195 Pa. 450, 46 Atl. 1, a declaration in connection with a gift to testator's sister, who was his sole next of kin, that "this shall be considered as the only share she shall have out of my estate," was effectual to exclude her from taking under a gift over in case of the death of testator's son without children, to "my next of kin, etc., including the issue of my brothers George B. and his second wife, Rosanna."

In *Tucker's Estate* (1904) 209 Pa. 521, 58 Atl. 889, where testatrix gave her residuary estate to her daughter Mabel, "but under the following restrictions, viz.: I intend that no portion of my estate shall fall to my husband, Alva J. Tucker, or to his relatives on his father's or mother's side; but in case of the death of my daughter without her having heirs, my estate is to fall to my mother, Deborah Jackson, which, in case of her death before said property shall fall into her hands, then it is to fall to her heirs and legal representatives," and, the testatrix's mother having died first, the granddaughter became her heir and thus took, in addition to her defeasible estate, a vested remainder in fee, it was held that the words of the will were effective to exclude the husband and his relatives from taking, even through the daughter Mabel as heir of her grandmother.

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In *Burton v. Burton* (1920) 113 S. C. 227, 102 S. E. 282, where testatrix who, by the second item of her will, had devised to a son a certain tract of land, and by the ninth item gave to the children of a deceased son \$25 each "as their full share of my estate," by codicil confirmed her will, except item 2, in place of which she bequeathed to her son the sum of \$50 and directed that the tract which she had given him be sold and the proceeds divided equally "among my other heirs herein named or their bodily heirs," it was held that as the provisions of the codicil were to be read in lieu of those of item 2, for which they were substituted, item 9 was operative to exclude the persons named therein from participation in the gift of proceeds to testatrix's "other heirs."

In *Ellison v. Woody* (1819) 6 Munf. 368, a daughter to whom testator gave a pecuniary legacy, "and no more," as having received of him already what he thought sufficient of his estate, was held not to be entitled to participate in a residuary gift to "all my children above mentioned."

On the other hand, in *Fuchshuber v. Krewson* (1904) 33 Ind. App. 257, 71 N. E. 187, it was held that the persons referred to were not excluded from a remainder given upon testator's wife's death to "my children or their legal representatives," by a provision in a subsequent item that "inasmuch as my sons John Adam and George Philip have each received their full share at my hands, and as George Frederick seldom, if ever, comes to see me, and as he received as above stated \$500, I desire that all the remaining portion of my estate, both personal and real, of whatever nature I may die possessed of, shall be equally divided among my sons and daughters," and naming the other sons and daughters.

And in *Re Clarke* (1916) 174 App. Div. 736, 161 N. Y. Supp. 484, affirmed in (1917) 220 N. Y. 660, 116 N. E. 1040, testator, an experienced lawyer, by the second clause of his will stated: "Inasmuch as my eldest son, Ernest J. Linson, has during my lifetime enjoyed so much of my estate as would be equal to or greater than the share hereinafter bequeathed to his brothers, I make no provision for him by this instrument." By the fourth clause he created a trust in the residue of his estate and directed one quarter of the income to be paid to each of his three sons, other than Ernest, and one quarter to the wife of Ernest. At the majority of his grandson, Paul, a son of Ernest, the testator directed the trust property to be divided into four parts, one fourth to go to each of the three sons who were mentioned by name, and one fourth to Paul. He further directed, in case Paul should die without issue before reaching his majority, that the entire estate be divided into three equal parts and paid to the three sons, whose names are mentioned. The testator

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then further provided as follows: "In case any of my sons entitled to a share in the fund so held in trust for him die before the termination of the trust estate, I direct that his share in the income and in the principal estate be paid to his issue if he leave any; if he leave no issue then I direct that the share in the income and in the principal which the brother so dying would have taken if living be divided among his brothers then surviving and said Paul Linson and the issue of any of his brothers who may have died before him." It was held that testator's scheme of equality would be best conserved by construing the will so as to permit Ernest to participate with his brothers and his son Paul in the portion of the trust estate which was created for the benefit of another brother, who died without issue.

In *Sigel's Estate* (1905) 213 Pa. 14, 1 L.R.A.(N.S.) 397, 110 Am. St. Rep. 515, 62 Atl. 175, a codicil giving to divers of testator's relatives certain sums of money, "and no more," was held not to operate as a revocation *pro tanto* of a residuary bequest to testator's "heirs."

And in *Gantz v. Tyrrell* (1898) 7 Pa. Super. Ct. 249, it was held that a pecuniary bequest to testator's only surviving son would not raise an unavoidable implication that he was not to take under a subsequent direction for distribution among testator's "heirs."

In *Dieter v. Shafter* (1897) 70 Vt. 150, 40 Atl. 100, where testator, whose nearest of kin were a mother and sister, that sister's son, and the children of a deceased sister, bequeathed to his mother two thirds of the net income of his estate for life and one third to another person, and, upon the death of both, a portion of the net income to his sister for life and the remaining portion to her son, and upon the sister's death bequeathed the whole income to her son, and then said that it would please him to make the husband of the deceased sister and his family beneficiaries of his estate if it were not for their greater wealth and his recent loss by fire and sickness, and concluded by declaring that "when the bequests aforesaid cease to become due, and any portion of them or either of them, they, with all interest then due, shall be divided among the surviving heirs of" testator's father and mother, it was held that the exclusion of the children of the deceased sister was from participation in the income only, and not from the ultimate division.

E. S. O.

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[ONTARIO APPELLATE DIVISION.]

DELORY v. GUYETT.

47 Ont. L. Rep. 137.

Principal and agent — Authority to receive payment — Effect of payment by cheque.

An agent authorized to receive money for his principal cannot receive anything but money, but if he receives a cheque which is paid before his authority is revoked there is a good payment to the principal.

— Solicitor acting for mortgagee — Deposit of cheque to solicitor's credit — Cheque drawn by solicitor paid from proceeds after mortgagor's cheque honored.

A payment of the mortgage debt, and a discharge of the mortgagor, result where the latter had been directed by the mortgagee to pay the mortgage money to the mortgagee's solicitor and gave the solicitor a cheque payable to him, and was told a discharge could not be given until the cheque was paid, and the cheque was deposited in a bank in which the solicitor had a credit insufficient to pay a cheque drawn by him on the same day, and the bank, although it did not treat the amount of the cheque as available until it learned that there were sufficient funds to meet it, after learning of this fact, paid the cheque drawn by the solicitor, and the latter subsequently applied the balance to his own use.

Ferguson, J.A., dissenting.

(February 20, 1920.)

[138] ACTION for a declaration that a mortgage made by the plaintiff to the defendant had been fully paid and satisfied and for an order upon the defendant to discharge the mortgage or reconvey the mortgaged land.

The action was tried by Lennox, J., without a jury, at a Toronto sitting.

Arthur J. Thomson, for the plaintiff.

T. R. Ferguson, for the defendant.

Lennox, J.: This is a case of great hardship arising out of the dishonesty of a solicitor. It matters not which way the decision is, it results in a very serious loss to an innocent person. The dangerous agency of sympathy can play no part, for I have no rea-

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son to believe that either one of the parties can bear the loss better than the other; and, on the contrary, I have fair ground to infer that the loss, on whichever of the litigants it falls, will be a very severe blow indeed.

The plaintiff is a married woman residing in Hamilton; she borrowed \$2,500 from the defendant upon a mortgage of her property in Toronto. The defendant resides in Toronto and is an employee of Brown Brothers, stationers, carrying on business here. When the plaintiff wanted to effect the loan, she, upon the suggestion of an acquaintance, applied to Mr. Loftus, a solicitor, with whom she had no previous acquaintance. The relations between the defendant and Loftus, if any, previous to this mortgage transaction, were not disclosed. It is a question of fact whether the defendant was in the habit of employing Loftus as a solicitor or not, and the fact could have been deposed to if he desired to do so, and thought of it. The mortgage is dated, the execution sworn to, and the mortgage registered, on the 30th May, 1913. It was prepared in the office of Mr. Loftus, and it is perhaps a reasonable inference that the title was searched by a solicitor. There is no suggestion that any solicitor other than Mr. Loftus was engaged by either party. The consideration money was paid to the plaintiff by Loftus, and the mortgage and title deeds left with him. The plaintiff and defendant did not meet at all. I think it is fair to conclude that at this time Loftus was the solicitor of both parties. There is no ground for inferring that [139] in this transaction Loftus continued to be the solicitor of either party after the loan was completed; and, as I said, there is no evidence either way as to other transactions between Loftus and the defendant. The plaintiff at the time obtained the defendant's house address from Loftus, and the defendant then, or at all events before the 27th May, 1918, obtained the mortgage and other papers. During the currency of the mortgage the plaintiff regularly remitted the interest from time to time falling due upon the mortgage, by her cheque payable in Hamilton.

About a month before the principal money became due, the plaintiff wrote the defendant saying that she might not be able to have the money exactly at the date of maturity, and asking if, in that event, she could have a brief extension of time. She says she

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inclosed a stamped—and I think addressed—envelop for reply. She got no answer. The defendant says he got the letter, but no envelop, and that he instructed Loftus to answer it. The circumstance is not important, except perhaps as a slight indication that the defendant was disposed to leave the closing up of the loan to Mr. Loftus. It may not have meant that. At best it is an equivocal action, and the most that can be argued is that it assists in interpreting what the defendant really intended the plaintiff to do when payment of the mortgage was subsequently discussed between the plaintiff and defendant by telephone. I think a stamped envelop was inclosed by the plaintiff in her letter to the defendant, as she says.

On the 27th May, 1918, the plaintiff called the defendant on the long-distance telephone, and she says she talked to him at his house. The call was put in by her daughter, and she only took the receiver when he was announced to be on the line. The defendant says his wife answered, and that he was connected where he was working, at Brown Brothers' place of business. His wife did not give evidence, and it may be as the defendant says, but it is not a contradiction of the plaintiff, as, unless he told her, she would not know where he was speaking from. The plaintiff's account of the telephone conversation was in substance: "I phoned the defendant on Monday the 27th May, 1918, that I was prepared to pay off the mortgage and would go down on Wednesday morning by the 8:35 train, and asked him to meet me. He said he was very busy, but to come down and pay the money [140] to Loftus. I repeated, 'Pay the money to Mr. Loftus,' and he said, 'Yes, for I'll send Mrs. Guyett over with the mortgage and deed.' I said, 'I will go direct from the train to the lawyer's office,' and I went accordingly."

The plaintiff's daughter was to go with her mother to Toronto, and listened to the Hamilton end of the telephone conversation. She corroborates her mother. The defendant in substance says: "She said she was coming to pay off the mortgage on Wednesday. Would I meet her? I said I could not. She said, 'Will I pay it, or will it do to pay it, to Mr. Loftus?' I said, 'I guess so.' That's all. I called up Mr. Loftus and sent the papers to him by my wife." On cross-examination he said: "She wanted to make an
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appointment with me to pay off the mortgage. She asked if it would be all right to pay it to Mr. Loftus, and I said, 'I guess so.' "

The parties substantially agree as to all that is important. They differ a little as to how the name of Mr. Loftus was introduced. I think they were both honest in their statements; but, even aside from the corroboration of the plaintiff's evidence by her daughter, I have more confidence in the verbal accuracy of the plaintiff than of the defendant.

The plaintiff at the time appointed went to Mr. Loftus's office, accompanied by her daughter, found the papers in his hands as arranged, and paid the principal money and interest owing on the mortgage, the costs of exchange and of the discharge, by her cheque, payable in Hamilton. The solicitor then gave her the deed, mortgage, and insurance policy,—the latter indorsed by Mr. Loftus. She then said, "What about the discharge?" and was told that the discharge is not given until the cheque is paid, and it will be sent on. The cheque was made payable to Loftus, who filled it up. He put it into the bank that day, and it was entered in his account. It is spoken of as "a deposit," as distinguished from a collection, if that makes any difference, but the banker indorsed it "not cleared yet," and refused to allow it to be drawn upon until advised that the cheque was paid next day.

Mr. Ferguson very strenuously argued that, if the defendant directed that the money be paid to Loftus, yet Loftus was only the defendant's agent to receive money, and a cheque is not money, distinguishing between the effect of payment in cash and [141] something as a substitute, and referred to a great many authorities; but the money was paid, and whether on Wednesday or Thursday is of no consequence.

With deference, I cannot see that the cases relied upon are in point. *Barker v. Greenwood* (1837) 2 Younge & C. Exch. 414, 160 Eng. Reprint, 458, 1 Jur. 541, and *Bridges v. Garrett* (1869) L. R. 4 C. P. 580, 39 L. J. C. P. N. S. 251, 22 L. T. N. S. 448, 18 Week. Rep. 815, are cases where the agent accepted the set-off of claims. *Blumberg v. Life Interests and Reversionary Securities Corporation* [1897] 1 Ch. 171, 66 L. J. Ch. N. S. 127, 75 L. T. N. S. 627, 45 Week. Rep. 246, is a case of tender-

ing a cheque instead of money. In *Sykes v. Giles* (1839) 5 Mees. & W. 645, 151 Eng. Reprint, 273, 9 L. J. Exch. N. S. 106; *Hine Brothers v. Steamship Insurance Syndicate Limited* (1895) 72 L. T. N. S. 79, 11 Reports, 777, 7 Asp. Mar. L. Cas. 558, and *Williams v. Evans* [1866] L. R. 1 Q. B. 352, 35 L. J. Q. B. N. S. 111, 13 L. T. N. S. 753, 14 Week. Rep. 330, agents authorized to act on a cash basis took bills of exchange, and the attempt was to throw the incidental loss upon the principal.

These cases all turn upon principles not presented in this action. The plaintiff's cheque did not *per se* amount to payment, and, if dishonored, a discharge, whether given by the defendant or an agent, would not relieve the land of its burden as between the mortgagor and mortgagee, whatever effect it might have as to innocent third parties, by way of estoppel. Neither do I think that the inclusion of the costs of exchange and the fee for the discharge of the mortgage alters the situation. All the cases recognize that the usual course of business may be followed. The payment was made as it had always been made before, and it was reasonable for the defendant to expect that it would be made in this instance as it had always been made. If he desired that the cheque be made payable to his own order, he had only to say so. He knew she was coming to pay off the mortgage, he told her to come, and said it would be all right to pay it to Mr. Loftus. He sent down the papers in consequence, as he said he would do, and knew that she would not get a discharge immediately, for he had not signed one. The money was paid on Thursday, and if paid on Wednesday the only effect would have been to enable Mr. Loftus to appropriate it a few hours earlier than he did. It is a hard case either way. Both parties were very slow to act afterwards, but by the time the plaintiff would reasonably have been put upon inquiry the money was irretrievably lost. It is possible that if the defendant had followed up his inquiries on the 29th, or even the next day, and insisted [142] upon his money or the return of his papers, the excuses of Mr. Loftus, whatever they were, would have been exposed in time, and the money might not have been lost; but this does not decide anything. The question is, In what was done, was Mr. Loftus, on the facts, the ostensible agent of the defendant? Was he held out as the defendant's agent to receive the

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money? Halsbury's Laws of England, vol. 1, p. 158, ¶ 346. I think he was, and the defendant is estopped from disputing it.

I would feel better satisfied if I could find justification for leaving each party to pay his and her own costs. If the delay of the plaintiff in inquiring about the discharge—although the discharge is for the protection of the mortgagor only—had prejudiced the defendant, I would think this a justification, but it did not.

There will be judgment for the plaintiff in the terms of the prayer in the statement of claim, and with costs if demanded. They should not be insisted upon.

The defendant appealed from the judgment of **Lennox, J.**

The appeal was heard by **Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A.**

Ferguson, for the appellant, argued that payment by cheque was not authorized. In any event delivery to the solicitor of an unmarked cheque to his order was not payment, even though the solicitor was the defendant's agent to receive payment of the moneys in question. In order to constitute payment, the plaintiff must have handed the solicitor cash. *Bridges v. Garrett* (1869) L. R. 4 C. P. 580, at p. 588 (1870) L. R. 5 C. P. 451, 39 L. J. C. P. N. S. 251, 22 L. T. N. S. 448, 18 Week. Rep. 815; *Hine Brothers v. Steamship Insurance Syndicate Limited* (1895) 72 L. T. N. S. 79, 11 Reports, 777, 7 Asp. Mar. L. Cas. 558; *Barker v. Greenwood* (1837) 2 Younge & C. Exch. 414, 160 Eng. Reprint, 458; *Pearson v. Scott* (1878) L. R. 9 Ch. Div. 198, 38 L. T. N. S. 747, 26 Week. Rep. 796; *Coupe v. Collyer* (1890) 62 L. T. N. S. 927, at p. 928; *Wrouth v. Davies* (1858) 25 Beav. 369, 53 Eng. Reprint, 678, 27 L. J. Ch. N. S. 635, 4 Jur. N. S. 396; Halsbury's Laws of England, vol. 26, p. 745, ¶ 1235; *Blumberg v. Life Interests and Reversionary Securities Corporation* [1897] 1 Ch. 171, 75 L. T. N. S. 627, 45 Week. Rep. 246. The solicitor converted the moneys paid to him by the plaintiff to his own use when he was acting within the scope of his authority to cash the cheque.

Thomson, for the plaintiff, respondent, denied that the solicitor

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tor had converted the moneys to his own use. The cheque was not [143] discounted. The solicitor was the agent of the defendant to receive payment; and, as the cheque was paid to the solicitor before his authority was revoked, the handing of the cheque to him was payment. *Pape v. Westacott* [1894] 1 Q. B. 272, 63 L. J. Q. B. N. S. 222, 9 Reports, 55, 70 L. T. N. S. 18, 42 Week. Rep. 131; *Walker v. Barker* (1900) 16 Times L. R. 393. The payment was in fact made to the Bank of Ottawa as agent for Loftus.

Ferguson, in reply.

Meredith, C.J.O.: This is an appeal by the defendant from the judgment dated the 17th March, 1919, which was directed to be entered by Lennox, J., after the trial before him, sitting without a jury, at Toronto, on the 12th and 13th of that month.

The case was ably argued on both sides, and we have to determine on which of two innocent persons, neither of whom is well able to bear it, the loss sustained by the dishonesty of a solicitor must fall.

The appellant held a mortgage made by the respondent on property in Hamilton which she owned, and she lived in that city. The mortgage had been prepared by the solicitor, Loftus by name; and, being desirous of paying it off, the respondent came to Toronto and went to the office of Loftus, where she expected to meet the appellant. Communication was had with him, but he was unable to come to the office, and, being asked what the respondent was to do with the money she desired to pay to him, he directed her to pay it to Loftus, which she did. Loftus had possession of the mortgage, and the respondent signed a cheque on her banker in Hamilton for the amount owing on the mortgage and the cost of the discharge. The cheque was drawn by Loftus, and was made payable to him, and was given to him. Loftus's bank account at this time had a small sum at his credit, but not sufficient to pay a cheque for \$1,060, which he drew on the day on which the deposit of the cheque was made. There is no doubt, I think, that Loftus intended to use the proceeds of the cheque, or part of it, for his own purposes. It was deposited with his banker on the 29th May, 1918, and placed to his credit. The banker, however,
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did not treat the amount as available to be drawn against until it was learned that there were funds in the bank on which it was drawn to meet it. This was learned on the [144] day following the making of the deposit, and then the amount credited to Loftus's account became available to be drawn on by him, and the cheque that he drew, having been again presented, was paid. In this way part of the proceeds of the respondent's cheque was applied to pay this cheque, and the remainder of it was afterwards applied by Loftus to his own use.

The result of the appeal depends entirely upon a question of fact. The law to be applied is clear, I think. There is no doubt that an agent authorized to receive money for his principal may not receive anything but money; but it is equally clear that, if he receives a cheque on a bank, and the cheque is paid to the agent before his authority is revoked, that is a good payment to his principal.

In *Williams v. Evans* [1866] L. R. 1 Q. B. 352, 35 L. J. Q. B. N. S. 111, 13 L. T. N. S. 753, 14 Week. Rep. 330, an auctioneer had taken a bill of exchange for the deposit, and it was held that he had no authority to receive payment in this way, but in delivering the judgment of the court, Blackburn, J., said:—

“If the bill had become due and been paid before the authority of the auctioneer had been revoked, it would have amounted to much the same thing as cash.”

In *Bridges v. Garrett* (1870) L. R. 5 C. P. 451, at p. 454, 39 L. J. C. P. N. S. 251, 22 L. T. N. S. 448, 18 Week. Rep. 815, Cockburn, Ch. J., after saying that where an agent is authorized to receive money for his principal he must receive it in money, added:—

“If, however, payment is made by cheque, and the cheque is duly honored, that is a payment in cash.”

There is nothing in *Paper v. Westacott* [1894] 1 Q. B. 272, 62 L. J. Q. B. N. S. 222, 9 Reports, 55, 70 L. T. N. S. 18, 42 Week. Rep. 131, to cast doubt upon these statements of the law; on the contrary, Lindley, L.J., referring to *Bridges v. Garrett*, said (p. 279):—

“The whole question there turns upon the cheque being cashed:

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but if it is cashed it is a mere piece of machinery." *Walker v. Barker* (1900) 16 Times L. R. 393, is to the same effect.

On the facts of this case, the proper conclusion is, I think, that the respondent's cheque was paid, and when it was paid her debt to the appellant was discharged.

I do not think that what Loftus did in depositing the cheque transferred it for value to the banker and so converted it to his own use. It appears to me that what he did was to deposit it as so much cash to the credit of his account, and what the bank did was so to credit it, subject to the cheque being honored when it [145] should be presented for payment. It was, as I view it, an ordinary, everyday transaction, and in the circumstances of this case the bank received the cheque as agent of Loftus to collect it. It might have been different if Loftus had drawn cheques on his banker, and the banker had honored them on the faith of the cheque being good; but it is unnecessary to decide what the result would have been if that had been the state of facts.

I would dismiss the appeal, with costs.

Maclaren and Hodgins, J.J.A., agreed with Meredith C.J.O.

Magee, J.A.: I agree with the reason and conclusion of my Lord the Chief Justice.

The question seems to me to be entirely one of fact and agency. The defendant told the plaintiff to pay Loftus. It is conceded that at least Loftus had authority to receive cash. Had he received cash, it would have been the natural and proper course to have deposited that in the bank. He could have misapplied it. The defendant was not guarding himself against that in giving instructions to pay him. Having received, instead of cash, a cheque, he puts that in the bank, which would be the natural and proper course.

The so-called deposit of the cheque in the bank was not a discounting of it. The bank placed no money at his disposal by reason of its receipt of the cheque, and did not so until it learned of the cheque being paid. The credit of the amount in his account, without the intention of paying it to him or his order, was
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only a matter of temporary bookkeeping, such as occurs hourly, and one might say necessarily, with all cheques received by banks. Not being willing to pay him the money for it in advance of knowledge that it was honored, the bank held it only for him. Whether it was entered by the bank among bills for collection—a very unlikely course—or not, makes no difference, the fact being that it really was only for collection. On the following day the cheque was honored, and the money became unconditionally subject to his order in his bank account, just as if he had received cash and deposited it. Being there subject to his order and by his own act, it was as much received by him as if [146] still in his own hands. The outstanding cheque which he had given did not operate as an assignment *pro tanto* of the money at his credit, as has often been held. Up till the moment of payment of that cheque by his bankers, he could have stopped payment. The fact of it not being stopped and of his allowing it to be paid out of the proceeds of the respondent's cheque, may have been a misapplication of the fund, but it was a misapplication after the respondent had done her part completely, and complied with the terms of his agency. In *Hine Brothers v. Steamship Insurance Syndicate Limited* (1895) 72 L. T. N. S. 79, Lord Esher said (p. 82):—

“If within the proper time the broker was to receive a cheque upon a banker, payable on demand by his taking it to a banker, and if he takes it to a banker and gets paid in cash, according to the custom, not of brokers alone, but of all people of business, and even those who are not in business, it is accounted as cash.” Bruce, J., said (p. 80) that there was a wide difference between the discount of a bill and the payment of a cheque.

It is, perhaps, possible that, having given an unmarked cheque to an agent of the appellant, who was not authorized to receive an unmarked one, the respondent might be entitled to demand it back from him, and that he could not properly refuse by saying he now held it from the appellant, who had not authorized him. But, even if we grant that the cheque was held for the respondent until it was honored, and the money placed to Loftus's credit in the bank, the moment that took place the moneys were held by him for the appellant; and, as the misapplication of them by

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honoring his cheque necessarily took place afterwards, it was the appellant's loss.

I do not, however, consider that he had not authority to receive a cheque, marked or unmarked, in the sense of receiving it to have it cashed or to deliver it to the appellant. Until marked or cashed it might not operate in favor of the respondent as satisfaction of the mortgage debt any more than if given to the appellant himself, but none the less it would be held by Loftus for the appellant with the like effect as if held by the appellant himself, and could be demanded by the appellant from him, and could not be demanded back by the respondent.

I would dismiss the appeal.

[147] **Ferguson, J.A.**, dissenting: This is an appeal by the defendant from a judgment of Lennox, J., dated the 17th March, 1919, whereby he declared that a mortgage given by the plaintiff to the defendant had been fully paid and satisfied and should be discharged.

The mortgage is dated the 30th May, 1913, and was given to secure repayment of a loan of \$2,500 and interest, the principal to become due and be paid in lawful money of Canada on the 30th May, 1918.

The plaintiff resides in Hamilton and the defendant in Toronto.

On the 27th May, 1918, the plaintiff called the defendant on the long-distance telephone, and her account of the conversation which resulted reads:—

“Q. I would like you to tell me the conversation between yourself and Mr. Guyett over the long-distance telephone on the 27th of May?

“A. I long-distance phoned him. I said I had got the money and I was ready to come down and pay off the mortgage, and also the last six months' interest. I said, 'Will you meet me at the lawyer's office, or where will you meet me?' He said: 'Well, I am very busy now. We are shorthanded for men, which makes it hard for me to get off. I don't think it will be necessary for me to be there. You can come on down and pay Mr. Loftus.' I repeated it after him. I said, 'Pay Mr. Loftus?' He said: 'Yes,
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for I will send Mrs. Guyett over with the mortgage and the deed.' Then I told him I would leave on the Wednesday.

"His Lordship: He said he was very busy and could not get away. What else? A. He said to come on down to pay Mr. Loftus.

"Q. What else? Something about send papers in? A. I said, 'Pay Mr. Loftus?' He said: 'Yes, I will send Mrs. Guyett over with the mortgage and the deed.'

"Mr. Thomson: Q. Go on. A. I told him what train I was coming on. I said I would come on Wednesday at 8:35 on the C. P. R. I said, 'I will go right from the station to the lawyer's office.' "

The plaintiff came to Toronto on the day agreed upon, gave Loftus an unmarked cheque drawn on the bank of Montreal, Hamilton branch, and received from him the deed, mortgage, and insurance policy; she asked for a discharge of the mortgage, but [148] did not receive it. She explains why at pages 19 and 20 of the stenographer's report of the evidence:—

"Q. When you came here the purpose was to pay your money and get a discharge of your mortgage? A. Yes, sir.

"Q. Mr. Loftus took this piece of paper which was blank, exhibit 2, from you? A. Yes.

"Q. And he wrote it out? A. Yes.

"Q. Then he asked you to sign it, and you signed it, and you said to him, 'What about the discharge?' A. Yes, sir.

"Q. He didn't hand you the discharge because he said—what is it? A. 'We never discharge a mortgage until we get the cheque cashed. The cheque has to be cashed first.' I thought that was the law.

"Q. The cheque had to be cashed? A. Yes.

"Q. You left this order on your bank at Hamilton with Mr. Loftus, payable to him, upon the understanding that you would get your discharge when your cheque was paid? A. Yes.

"Q. You understood Mr. Loftus when he received the amount of your cheque—this cheque was to him? A. Yes, sir.

"Q. When he received the amount of your cheque, which included his charges as well as the amount of the mortgage moneys, he would give you your discharge? A. Yes. He said so.

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"Q. He said he would? A. Yes.

"Q. Upon that understanding you left him this cheque? A. Yes."

On the day he received it, Loftus indorsed and deposited the cheque in his bank, and the bank gave him credit in his current account for the face value thereof, less \$3 charges (see exhibits 6, 7, and 8). The transaction between the bank and Loftus is told by the witness Tierney at pp. 41, 42, 46. He says:—

"Q. You are a clerk from the Bank of Ottawa, Toronto? A. Yes.

"Q. What is your position there? A. A to L ledger keeper.

"Q. Did J. T. Loftus keep an account in your bank? A. Yes.

"Q. During 1917 and 1918? A. Yes.

"Q. I show you exhibit 2, which purports to be a cheque for \$2,588.52. Correct? A. Yes, sir.

"Q. Whose indorsement is on the back of that cheque? A. J. T. Loftus.

[149] "Q. You know Mr. Loftus's signature as the ledger keeper there? A. Yes, sir.

"Q. Is this Mr. Loftus's bank book I produce to you (showing)? A. Yes.

"Q. Does it show the account during 1918, including the month of May? A. Yes, sir.

"Q. Will you look at the book and see if he deposited that cheque, exhibit 2, in his own bank account in your bank? A. Yes, sir.

"Q. On what date? A. On the 29th of May, 1918.

"Q. That is the date of the cheque. He deposited that cheque to his own account? A. Yes, sir.

"Q. In connection with that, is this (showing) the deposit slip? A. Yes, sir.

(Exhibit 6, bank book of Mr. Loftus—exhibit 7, deposit slip.)

"Q. If this cheque had come to your office as a collection, would it have reached this bank account of Loftus at all, or gone into this bank account? A. No, sir.

"Mr. Thomson: I don't understand the question.

"His Lordship: Neither do I.

"Mr. Ferguson: He says it came in there not as collection, but as a deposit to this account.

"Q. The cheque, exhibit 2, if it had come as a collection to your bank, what course would it have taken instead of the one you have indicated here? A. It would have gone through the collection department, and would not have been put to Mr. Loftus's account until it was paid in Hamilton and the funds remitted back to us.

"Q. As a collection? A. Yes.

"Mr. Thomson: You hardly need expert evidence on that.

"Mr. Ferguson: Instead of that, we have that deposited to his account there as his own money.

"His Lordship: Q. You gave him credit for that amount although you didn't know whether that cheque was worth anything or not? A. Yes, sir."

Page 46:—

"His Lordship: Virtually you had it for collection; you did not give him any liberty to draw on it until you got the money? A. We never gave Loftus any liberty to draw until we knew his cheques were paid.

[150] "Q. So it was not effective until you got word from Hamilton? A. Until we got word from Hamilton it was paid."

On the same day as he received the credit, Loftus issued cheques against it; one of these, calling for a payment of \$1,060, were represented to the bank of Ottawa on the 29th May, but was not paid until after the bank had, on the 30th May, telephoned to Hamilton and had been informed that the plaintiff's cheque had been presented to the Bank of Montreal in Hamilton and paid.

It is conceded that Loftus has not paid the defendant; counsel agreed that Loftus had taken advantage of the situation to get money for his own purposes. Neither party is willing to look to Loftus for his or her money.

The appellant contends: (1) That payment by cheque was not authorized; (2) that Loftus did not receive the cash for the cheque, in that, before it was presented to the Bank of Montreal for payment or paid, Loftus had transferred the cheque to the Bank of Ottawa in such circumstances as to make that bank holder of the cheque in its own right; and, consequently, payment by

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the Bank of Montreal was not payment to Loftus or to the appellant.

The respondent relies on *Bridges v. Garrett* (1870) L. R. 5 C. P. 451, 39 L. J. C. P. N. S. 251, 22 L. T. N. S. 448, 18 Week. Rep. 815, and *Walker v. Barker* (1900) 16 Times L. R. 393, and contends: (1) That under the circumstances, Loftus was authorized to accept a cheque as payment of the mortgage moneys; (2) the mortgage moneys were in any event paid when the cheque was cashed either by Loftus or by the bank; (3) that, while the transaction between the bank and Loftus took the form of a debtor and creditor transaction, it was in truth and substance a principal and agent transaction, and the payment was in fact made to the Bank of Ottawa as agent for Loftus.

The appellant answers that in the *Bridges Case* and in the *Walker Case* it was found as a fact that the agent had authority to receive payment by cheque; that in both cases it was the proceeds of the cheque that the agent converted, whereas in the case at bar the agent had not authority to receive payment by cheque, and he misappropriated the cheque and not the proceeds thereof.

The authorities cited by counsel are collected and considered in Bowstead on Agency, 6th ed. p. 70. The same authorities, together with some additional Canadian and American authorities, [151] are considered in 31 Cyc. p. 1378. I have read most, if not all, of the authorities cited, and think they establish: (1) That, when the circumstances adduced in evidence enable the court to find as a fact that the authority given to the agent conferred upon him power to accept a cheque as payment, payment of the cheque, even if not made to the agent, is payment to the principal. *Bridges v. Garrett*, *supra*, as explained in *Pape v. Westcott* [1894] 1 Q. B. 272, 62 L. J. Q. B. N. S. 222, 9 Reports, 55, 70 L. T. N. S. 18, 42 Week. Rep. 131, and in *Hine Brothers v. Steamship Insurance Syndicate Limited* (1895) 72 L. T. N. S. 79, 11 Reports, 777, 7 Asp. Mar. L. Cas. 558; (2) that, where the circumstances are such that the court cannot find as a fact that the authority given to the agent conferred upon him power to receive payment by cheque, payment of the original debt is not established unless it is proven that the cheque was paid, and that the proceeds of the cheque reached the agent

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in the form of money immediately available for the satisfaction of the original debt. *Pape v. Westacott and Hine Brothers v. Steamship Insurance Syndicate Limited*, *supra*; *Pearson v. Scott* (1878) L. R. 9 Ch. Div. 198, 38 L. T. N. S. 747, 26 Week. Rep. 796. The principle seems to be that, where there is authority to receive a cheque, the receipt of the agent is a receipt of the principal, the cheque itself is payment, it is the principal's property, and the agent holds and deals with the cheque for his principal, and his principal assumes the risk of his improperly dealing with the cheque, while in the case where the agent has not authority to receive a cheque, the cheque is the property of the agent, and the person placing the cheque in the hands and power of the agent assumes the risk of his dealing with it improperly. *Williams v. Evans* [1866] L. R. 1 Q. B. 352, 35 L. J. Q. B. N. S. 111, 13 L. T. N. S. 753, 14 Week. Rep. 330.

In the first case the debtor proves payment of the mortgage moneys by proving the delivery of the cheque; and payment of the cheque by proving that it has been cashed; in the second case he must prove not only the cashing of the cheque, but the cashing of the cheque by the agent, so that he has in his hands lawful money of Canada available to satisfy his obligations to his principal.

The case of *Crane v. Boltenhouse* (1845) 4 N. B. 581, seems to me to be in conflict with *Hine Brothers v. Steamship Insurance Syndicate Limited*, *supra*, while the other Canadian case referred to in Cyc., *Ætna Life Insurance Co. v. Green* (1876) 38 U. C. Q. B. 459, seems to fall within the class of cases where the agent was found to have authority to receive a cheque.

[152] To my mind the result of the appeal turns on the answers to two questions:—

(1) Had Loftus authority to receive a cheque as payment?

(2) Was the payment of the plaintiff's cheque by the Bank of Montreal a payment of funds to the defendant's agent so as to leave them in his hands available to satisfy the defendant's claim?

The answer to the first question turns on the meaning of the words "pay Loftus." Do they mean "pay Loftus in lawful money of Canada;" or should they, in the circumstances adduced in evidence, be held to mean "pay Loftus in money or by cheque?"

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Bowstead, p. 69, says:—

“An agent who is authorized to receive payment of money has, *prima facie*, no authority to receive payment otherwise than in cash, unless it is usual or customary in the particular business to receive payment in some other form, and the usage or custom in question either is a reasonable one, or is known to the principal at the time he confers the authority.”

In Halsbury's Law of England, vol. 1, p. 187, ¶ 400, the law is stated thus:—

“When an agent is employed to carry out a transaction which involves a payment to him on his principal's behalf, he must not compromise his principal's rights or part with his property until he has received payment, unless authorized by his instructions or by usage to do so. Payment, in the absence of instructions or usage, must be received in cash, and not otherwise.”

See also pp. 164, 165, and 210.

On the foregoing statements of the law the direction to “pay Loftus” would mean to pay in cash only, unless it is usual or customary to pay mortgage moneys by cheque, or at least usual for solicitors to receive the payment of mortgage moneys by cheque.

Bowstead states (pp. 100, 101) that “a solicitor has no implied authority, as such . . . to take a cheque in lieu of cash in payment of a mortgage debt, of which he is authorized to receive payment.”

The learned author justifies the foregoing statement of the law by referring to the opinion of Kekewich, J., in *Blumberg v. Life Interests and Reversionary Securities Corporation* [1897] 1 Ch. 171, 66 L. J. Ch. N. S. 127, 75 L. T. N. S. 627, 45 Week. Rep. 246. Counsel urged that the question for decision in that [153] case was not, “Had the solicitor power and authority to receive payment by cheque?” but, “Could the solicitor be forced to receive payment by cheque?” And, consequently the opinion expressed by Kekewich, J., on which the learned author relies, is *obiter*. Counsel's criticism seems justified, yet, as the learned judge dealt with the practice of solicitors receiving each other's cheques, his statement of the law and his reasoning are worthy of consideration. He says:—

“Then arises a novel question, namely, whether assuming that
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a solicitor or any other person is authorized, either expressly or by implication, to receive a legal tender, he is authorized to accept a banker's cheque. Mr. Warrington has been careful to limit the extent of the authority, by saying that the solicitor can do what is ordinarily done in the way of business by ordinary persons in transactions of the kind in question—that is to say, he would not be at liberty to accept a diamond or other pledge, or a mortgage or other security; but that as mortgage money is generally paid by cheques, he is at liberty to accept a cheque, though Mr. Warrington will not go so far as to say that he would be at liberty to accept a bill or promissory note. It seems to me that such an extension of authority by reference to the habits of mankind would be calculated to work mischief. The acceptance of a cheque involves passing a judgment on the solvency of the person who tenders the cheque. . . . A solicitor who has authority to accept a tender accepts anything short of a tender in cash at his own risk. No doubt it is usual for solicitors to trust each other and to accept each other's cheques, and the practice is desirable because it promotes good feeling and facilitates business. But I think it would be going too far to say that a solicitor has authority to accept a cheque because he has authority to accept a tender according to the law of the land."

The reasoning and opinion of Mr. Justice Kekewich may not support Mr. Bowstead's proposition just as stated by him, but they at least afford no ground for the respondent's contention that there exists a practice to the contrary. The plaintiff did not give any evidence of such a practice; and, in the absence of evidence, I would think that there is no basis for the contention that it is usual to accept cheques as payment of mortgage moneys.

[154] To find that Loftus had authority to receive a cheque as payment, we must, I think, conclude that he had the right to hand over the mortgage, title deeds, the insurance policy, and, if he had it, the discharge, in exchange for the cheque. Would any court say that a solicitor who had done these things had acted properly or that a custom or usage that permitted a solicitor so to act was just and reasonable? I think not.

The answer to the second question turns on whether the Bank of Ottawa was the owner of the cheque or held it simply as agent
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for Loftus, and whether the moneys represented by the credit in Loftus's account were moneys lent by the bank or were the plaintiff's moneys paid to the bank as agent for Loftus, and then credited to his account. There might have been no substantial difference between the course events took upon the deposit of the cheque and what would have happened had the cheque been received by the bank for collection. It is most unlikely that either Loftus or the bank officials gave a thought to the legal rights of the parties, or to what, if any, difference it made to such rights when the cheque was discounted instead of being accepted for collection. In such circumstances, I prefer to be guided by the form of the transaction, rather than to speculate as to what the parties intended, and by that process of reasoning to find a difference between the form and the substance.

Following the form of the transaction, there can be no doubt but that on the 29th May the Bank of Ottawa became and continued, till paid, to be the holder of the plaintiff's cheque, not as agent for Loftus, but in its own right, as transferee for value; that the bank did not purport to act as agent, but collected the plaintiff's moneys as owner of the cheque; that the moneys from the cheque were not credited to Loftus, but, on the payment of the moneys to the bank, other moneys already credited to Loftus's account were released from a sort of stop order that had been maintained against them, pending the payment of the plaintiff's cheque.

For these reasons, I am of opinion that Loftus had not authority to receive the plaintiff's cheque as payment of the defendant's mortgage moneys—that, when the cheque was cashed, it was not cashed and the moneys were not received by the defendant or by anyone on his behalf; that, on the reasoning of the judgment in [155] *Hine Brothers v. Steamship Insurance Syndicate Limited*. (1895) 72 L. T. N. S. 79, 11 Reports, 777, 7 Asp. Mar. L. Cas. 558, this appeal should be allowed.

Even if the proper conclusion is that the transaction between the Bank of Ottawa and Loftus was not a debtor and creditor transaction, but was in truth and substance a transaction between principal and agent, it does not seem to me to follow that the plaintiff has established payment to Loftus in lawful money of
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Canada by showing that she caused his account in the Bank of Ottawa to be credited with the amount she was directed to pay him personally and in cash. To my way of thinking, a bank credit and lawful money of Canada are different things. The defendant told the plaintiff to pay Loftus. That meant in lawful money of Canada; and, had it been shown that Loftus received lawful money of Canada, and converted it to his own use, the loss would have been the defendant's; but where, as here, it is neither shown nor alleged that Loftus ever received lawful money of Canada, it should, I think, be held that he never received anything for the defendant.

I would allow the appeal and dismiss the action.

Appeal dismissed (Ferguson, J.A., dissenting).

Note.—As between debtor and creditor, upon whom does loss fall where agent authorized to receive money only takes check and misappropriates proceeds.

Where an agent authorized to receive money only takes a check, cashes it, and appropriates the proceeds to his own use, there is generally held to be a payment and a discharge of the drawer's obligation. *Hart v. Northwestern Trust & Sav. Bank Co.* (1915) 191 Ill. App. 396; *Brown v. Grimes* (1921) — Ind. App. —, 129 N. E. 483; *Harbach v. Colvin* (1887) 73 Iowa, 638, 35 N. W. 663; *Cohen v. O'Connor* (1873) 5 Daly, 28, affirmed in (1874) 56 N. Y. 613; *Potter v. Sager* (1918) 184 App. Div. 327, 171 N. Y. Supp. 438, affirmed without opinion in (1920) 228 N. Y. 526, 126 N. E. 920; *Bridges v. Garrett* (1870) L. R. 5 C. P. 451, 39 L. J. C. P. N. S. 251, 22 L. T. N. S. 448, 18 Week. Rep. 815; *Walker v. Barker* (1900) 16 Times L. R. 393; DELORY v. GUYETT (reported herewith), *ante*, 590.

It will be observed that in the reported case (DELORY v. GUYETT), where a solicitor, authorized to receive cash only in payment, took a check from the mortgagor payable to himself, deposited it to his account, and the bank, after ascertaining that the check was good, paid a check which the agent had previously drawn, and the agent appropriated the balance of the money to his own purposes, it was held that when the check was paid the mortgagor's debt was discharged, Meredith, Ch. J., stating that the agent, by depositing the check, did not transfer it for value to the banker, and thus convert it to his own use.

And in *Potter v. Sager* (1918) 184 App. Div. 327, 171 N. Y. Supp. 438, affirmed in (1920) 228 N. Y. 526, 126 N. E. 920, where

an agent, authorized to receive payments of interest and principal in money, received a check payable to himself individually, and converted the proceeds when cashed, it was held that the indebtedness to the principal was thereby discharged, as there was a payment from the time the check was cashed. The court said: "Where a person is an agent with authority from his principal to collect principal and interest, the general rule is that a payment by a debtor to such agent, to constitute a good payment, must be made in cash. The reason for this rule is that a payment in any other medium is not as good as cash—is not the exact equivalent of cash. Thus, it has been held that the giving of a note, mortgage, postdated check, property, etc., does not constitute a payment, because the acceptance of those things by the agent exceeds his authority and constitutes the exercise of a discretion by the agent not vested in him by his principal. It would seem, however, that this court should take judicial notice of the fact that checks and drafts are usual and ordinary means of transacting business and transferring money in all business transactions; that, where an agent is given authority to collect money, the authority granted implies that he shall do so in the usual and ordinary way, and, where a check is given by the debtor, not postdated, and payable at a bank in the same city, the giving of such check payable to the agent constitutes payment from the time that such check is cashed in due course. 'Power to employ all the usual and necessary means to execute the authority with effect is an incident of every contract of agency.' Lawson, Contr. 2d ed. 227, § 184. Such a check, of course, would not constitute payment if not in fact honored on presentation in the ordinary course of business. The agent could not accept such a check in absolute payment and satisfaction. He can, however, receive a check which he has reason to believe will be honored upon presentation as a convenient and customary way of obtaining the money which he is authorized to collect. Such a payment offers no greater temptation to the agent than the payment of the money would offer. If the check is paid by the bank, then the agent has received what he was authorized to receive, and, if not paid when presented, the creditor has lost nothing. The reason for the rule which does not permit a payment to an agent by note, mortgage, etc., does not apply when payment is made by a check which is actually cashed by the bank upon which it was drawn."

In *Bridges v. Garrett* (1870) L. R. 5 C. P. 451, 39 L. J. C. P. N. S. 251, 22 L. T. N. S. 448, 18 Week. Rep. 815, where the defendant purchased property from plaintiff, and an attorney, appointed by plaintiff's steward, was also the defendant's attorney, and received a check from the defendant in payment of the purchase price, and the check at the attorney's request was indorsed to his bank, by which

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the proceeds were applied to pay his overdrafts, it was held that if the attorney had authority to receive the money there was a payment, and that no further recovery could be had. The court here said: "There is no doubt that, where an agent is authorized to receive money for his principal, he cannot allow it by way of set-off in accounts between the payer and himself; he must receive it in money. If, however, payment is made by cheque, and the cheque is duly honored, that is a payment in cash. There is nothing in the circumstance of a cheque being given which invalidates the payment. The present case, however, is a little complicated by the fact of the cheque having been crossed. It appears that the defendant, at Craig's request, crossed the cheque with the names of Craig's bankers. Craig's bankers got the cheque cashed, and carried the amount to the credit of Craig's account with them. If Craig's account had not been overdrawn, he would have had the money. The cheque, therefore, was in point of fact money. It was the same thing as if the defendant had paid the amount to Craig in cash, and Craig had paid in the cash to his account with his bankers, and had forwarded his own cheque to the lord or to the steward, and the bankers had, in consequence of the balance being against him, declined to honor his cheque. If Craig was authorized to receive the money, I think the payment to him was a payment to the plaintiff, and that there was nothing in the mode of payment to take the case out of the ordinary rule."

In *Brown v. Grimes* (1921) — Ind. App. —, 129 N. E. 483, it was held that where an attorney, having a claim to collect, who, both by a well-established rule of law and by statutory enactment, had no right, in the absence of special authority, to accept in settlement anything but money, took from the debtor a check payable to the creditor, and by indorsing thereon the name of the payee as his attorney received the money thereon, and embezzled it, the transaction amounted to the payment of the claim, the court saying: "Appellant's said attorney had no authority to receive the check as payment, nor could he by his indorsement impose a new contract liability upon appellant, who was his client; but, having taken the check in due course of his employment, he had implied authority to make a formal indorsement in behalf of his client for the purpose of making the collection and receiving the money. Having by indorsement of the check received the money thereon, [the attorney] had by this means effected the purpose for which he had been employed. He had collected, and had in his possession for appellant, in money, the full amount of the judgment he had been employed to collect. We therefore hold that the acceptance and indorsement of the check by appellant's attorney, and the receipt by said attorney of the proceeds of such check, under the peculiar facts of this case, amounted to a payment of the judgment."

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And in *Harbach v. Colvin* (1887) 73 Iowa, 638, 35 N. W. 663, where an attorney, to whom a mortgage had been sent for foreclosure, took a check from a junior mortgagee for the amount of the mortgage payable to such attorney, and he deposited it to his own credit in the bank in which he kept his account, and upon its being paid converted the money to his own use, it was held that the transaction amounted to a payment, and that the senior mortgagee could not recover on the promissory note given by the mortgagor.

And in *Cohen v. O'Connor* (1873) 5 Daly, 28, affirmed in (1874) 56 N. Y. 613, where defendant sent her husband for money which plaintiff was to loan her, and plaintiff gave him a check payable to his order, which he deposited to his own account and subsequently used the proceeds, it was held that there was a good payment.

And where an agent was sent to a bank to collect the amount due for material, and the bank gave the agent a check upon itself for the amount due, payable to the order of the principal, and the agent indorsed the check, collected the money, and disappeared, it was held that there was a payment, and that the principal could not recover for the amount of the check against the bank. *Hart v. Northwestern Trust & Sav. Bank* (1915) 191 Ill. App. 396. The court said: "The delivery of the check to him and the payment of it by the bank upon his indorsement all constituted one transaction and amounted to a collection by Ross [the agent] of the amount due." Attention was also called to the fact that the check in this case was one drawn by the bank on itself, and that its purpose was to preserve a convenient record by retaining it as a voucher of payment.

And in *Walker v. Barker* (1900) 16 Times L. T. 393, where a shop assistant had authority to accept payment in cash, or by check payable to his principal, it was held that the facts justified the inference that he had authority to accept payment by check drawn to himself, provided he received cash for the check, and that there was a payment where he accepted a check drawn in his favor, and received the cash thereon, although he embezzled it. J. T. W.

[ENGLISH COURT OF CRIMINAL APPEAL.]

THE KING *v.* WILLIS.

[1916] 1 K. B. 933.

Also Reported in 85 L. J. K. B. N. S. 1729, 114 L. T. N. S. 1047, 80 J. P. 279, 32 Times L. R. 452, 60 Sol. Jo. 514.

Criminal law — Evidence — Accomplice — Corroboration by wife of another accomplice.

On the trial of an indictment one of several accomplices in the crime
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charged was called as a witness against the accused. His evidence was corroborated by that of the wife of another accomplice who was not called. The wife was herself innocent of any connection with the crime:

Held, that under those circumstances the jury were entitled to rely upon her evidence as good corroboration, and that the mere fact that she was the wife of an accomplice, and that her evidence was not itself corroborated by an independent witness, did not disentitle it to credit.

Semble that *Rex v. Neal* (1835) 7 Car. & P. 168, was wrongly decided.

(April 10, 1916.)

APPEAL to the Court of Criminal Appeal.

The appellant, Willis, was indicted at the London Sessions with three other men named Poulton, Brooks, and Savage for stealing and receiving twenty-seven chests of tea. The last three pleaded guilty. Willis pleaded not guilty and was tried. At the trial the prisoner Poulton was called as a witness for the prosecution. He was a carman. His evidence was that on Christmas eve, the day of the larceny, he drove a van containing the stolen tea to the shop of the prisoner Brooks. When he got there Willis was in the shop parlor with Brooks. Witness carried the tea into the parlor. Brooks was writing out a cheque which Willis put into his pocket. Willis told witness to drive away the van and wait outside the shop of a man named Robert Davis. Willis came there and asked Davis to lend him 30*l.* on the cheque. Davis did so, and Willis handed the 30*l.* to the witness, who gave him back 3*l.* for himself. Robert Davis was also called as a witness. Although not charged with the larceny he admitted that he was a party to it. He said that on the day in question he went to Brook's place and saw Mrs. Brooks in the shop and Willis and Poulton in the parlor with Brooks. There were chests of tea in the parlor. Willis asked Brooks for a cheque. Mrs. Brooks was angry and told her husband [934] not to give a cheque. She told Willis that he ought to be ashamed of bringing the tea to her place. Brooks gave Willis 3*l.* in Treasury notes. Witness had 10*l.* out of the transaction. He knew it was a dishonest one. The prisoner Brooks was not called as a witness, but his wife was. She deposed that she was in her shop on the evening of Christmas eve

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when Willis arrived. He went into the parlor with her husband. She saw cases being brought into the parlor. She suspected the goods were stolen, and complained to Willis that he had no right to bring such things there, and he replied that he thought he was doing her husband a good turn. She had some words with her husband, and then went away for twenty minutes. On her return she found Willis and Davis with her husband. Willis said he must get Brooks to sign a cheque. She protested against her husband doing so. Brooks went to the till and gave Willis three or four Treasury notes. Mr. Purcell, who appeared as counsel for the appellant at the trial, contended that as Poulton and Davis were accomplices their evidence ought not to be acted upon by the jury in the absence of corroboration, and that the evidence of Mrs. Brooks afforded no such corroboration, upon the ground that she was the wife of another accomplice; and as she was in law one with her husband her evidence must be treated as if it had been given by him, and therefore itself required corroboration by an independent witness. He asked the deputy chairman, on the authority of *Rex v. Neal* (1835) 7 Car. & P. 168, to direct an acquittal. He also contended that even if her evidence was to be treated as corroboration at all it did not corroborate the accomplices in particulars implicating the accused, which it was contended that, according to *Rex v. Cohen* (1914) 10 Cr. App. Rep. 91, it was necessary it should do. The deputy chairman refused to direct an acquittal, or to warn the jury that the evidence of Mrs. Brooks ought not to be acted upon in the absence of corroboration. Willis was convicted and appealed against his conviction.

Huntly Jenkins, for the appellant. The deputy chairman was wrong in treating the evidence of the wife of an accomplice as corroboration. In Archbold's Criminal Pleading, 24th ed., at p. 457, it is said that "the testimony of the wife of an accomplice [935] is not such evidence as a jury ought to rely upon as confirmation of his statement." That proposition is supported by the case of *Rex v. Neal* (1835) 7 Car. & P. 168, where, the only evidence tendered in corroboration of an accomplice being that of his wife, the judge held that it was no corroboration and directed an acquittal. But even if the deputy chairman did not adopt the 10 B. R. C.

extreme course of directing an acquittal, he ought at least to have warned the jury that they should not rely on her evidence unless it was itself corroborated. *Rex v. Payne* (1913) 8 Cr. App. Rep. 171. Although Mrs. Brooks was herself innocent of any connection with the crime, the fact that she was the wife of a participant in it who had not yet been sentenced might induce her to say what was untrue for the purpose of throwing the blame on the appellant, in the hope that she might thereby affect her husband's sentence. Her evidence ought to be treated exactly as her husband's evidence would have been treated if he had been called, and in his case the jury would have been cautioned.¹

Roland Oliver, for the prosecution, was not called upon.

The judgment of the Court (Lord Reading, Ch. J., Ridley and Avory, JJ.,) was delivered by

Lord Reading, Ch. J.: The appellant, Willis, was convicted of feloniously receiving twenty-seven chests of tea, and from that conviction he now appeals. He was indicted along with three other men, named Poulton, Brooks, and Savage, for stealing and receiving the tea in question. Those three men pleaded guilty. Willis pleaded not guilty and was tried. At the trial amongst the witnesses called for the Crown was the prisoner Poulton, and a man named Davis, who on his own admission had participated in the larceny. Their evidence, although that of accomplices, was undoubtedly admissible, but the judge in such a case is bound to caution the jury that they ought not to act on such evidence unless it is corroborated; and here the deputy chairman in fact so directed them. Then a Mrs. Brooks was called, who gave evidence corroborating that of Poulton and Davis. She was the wife [936] of the prisoner Brooks, who had pleaded guilty. Brooks, the husband, was not called as a witness. Mrs. Brooks gave evidence that she was not herself concerned in the theft, that she had protested against the part her husband was induced to take in it, and endeavored to persuade him to have nothing to do with it. The truth of her statement was not disputed, and it was conceded

¹ At the hearing of the appeal no point was taken by counsel for the appellant as to the necessity of the corroborative evidence being such as to implicate the accused.

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that she was not in any way an accomplice. But it was argued, both at the trial and also before us, that as she was the wife of a person who had participated in the crime, and as husband and wife are one in law, her evidence ought to be regarded as if it had been given by Brooks himself. The deputy chairman did not accept that view; he thought that her evidence was not to be treated as if it was the evidence of an accomplice, and that the mere fact that she was the wife of a man who had taken a part in the theft was not enough to impose a duty on the judge to caution the jury against acting upon her evidence unless it was itself corroborated. On behalf of the appellant reliance was placed on a passage in Archbold's Criminal Pleading, 24th ed., at p. 457, where it is said that "the testimony of the wife of an accomplice is not such evidence as a jury ought to rely upon as confirmation of his statement." The case cited as an authority for that proposition is *Rex v. Neal* (1835) 7 Car. & P. 168. There on the trial of an indictment for larceny at the Oxford Assizes an accomplice of the prisoner was admitted as King's evidence, and the judge, Park, J., on being informed that the only witness who could be called to corroborate the accomplice's statement was his wife, said "confirmation by the wife is, in a case like this, really no confirmation at all. The wife and the accomplice must be taken as one for this purpose;" and he directed an acquittal. That decision that the prisoner in such a case is as a matter of law entitled to be acquitted is, in our opinion, wrong; the duty of the judge being, even if the wife is to be treated as one with her husband, to leave the case to the jury with a warning against relying on her evidence in the absence of further corroboration. But it is unnecessary to decide that point, for in our opinion that case has no application to the present. There the accomplice whose wife's evidence was held to be inadmissible as corroboration was the witness whom she was tendered to corroborate; whereas here [937] Brooks was not called. Her identity in law with her husband, if that was the ground of the decision in *Rex v. Neal*, *supra*, cannot affect the question of the admissibility of her evidence for the purpose of corroborating a third person. We think that that case is no authority for the proposition that Mrs. Brooks's evidence is to be treated as if it had been given by her husband, and that the
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deputy chairman was quite right in refusing so to deal with it. At the trial Mr. Purcell, who then appeared as counsel for the appellant, took a further point on his behalf, that the evidence of Mrs. Brooks, even if admissible at all, would be unavailing as corroboration unless it corroborated Poulton and Davis in some material particular implicating the appellant, which it was contended it did not. That point was not argued before us, but as there seems to be some misconception as to the present state of the law upon that subject, we think it would be well to take this opportunity of clearing up the matter and restating the rule. There are certain statutes which provide that certain classes of evidence shall be insufficient to support a conviction unless corroborated by some other material evidence implicating the accused; but corroboration where required by the common law is not subject to any such qualification. In *Rex v. Everest* (1909) 2 Cr. App. Rep. 130, which was a case of larceny, it was indeed said that "the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused." But in the later case of *Rex v. Wilson* (1911) 6 Cr. App. Rep. 125, 128, a case of burglary, this court took a different view. Lord Alverstone, Ch. J., said: "It must not be supposed that corroboration is required amounting to independent evidence implicating the accused;" and that view was confirmed in *Rex v. Blotherwick* (1911) 6 Cr. App. Rep. 281, where Lord Alverstone, Ch. J., said *arguendo*: "*Everest* goes too far; *Wilson* is the correct statement of the law." Those two cases finally set the matter at rest. But the question came again before this court in *Rex v. Cohen* (1914) 10 Cr. App. Rep. 91, 101. In that case the principal witness against the prisoner was an accomplice, and one question was whether there was sufficient corroboration of his evidence. In the course of [938] delivering the judgment of this court I there said: "We will assume for the purposes of this case, and without deciding it, that the test laid down in *Everest* is the right test to apply." The court then proceeded to examine the evidence, and came to the conclusion that even from that point of view there was abundant corroboration of the accomplice, and they accordingly confirmed the conviction. But in the
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argument at the trial in the present case it seems to have been assumed from what I so said in *Rex v. Cohen, supra*, that I intended to throw doubts upon the decisions in *Wilson's* and *Blatherwick's Cases*, and to reaffirm the rule as laid down in *Everest's Case*. That is a mistake. I there said: "The rule which we propose to apply in this case is that most favorable to the appellant's contention." What I meant was that even if the law had been as was laid down in *Everest's Case* it would not help the appellant; that assuming the statement of the rule that was most favorable to him there would still be sufficient corroboration. This court had no intention and indeed had no power to unsettle the law as established in *Rex v. Wilson* and *Rex v. Blatherwick, supra*. We think that in the present case there is no ground for interfering with the conviction, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Peet & Manduell*.

Solicitors for the Crown: *Director of Public Prosecutions*.

Note.—Corroboration of testimony of accomplice by another accomplice, or wife of accomplice.

I. Corroboration by innocent wife of accomplice, 618.

II. Corroboration by testimony of accomplice, 621.

I. Corroboration by innocent wife of accomplice.

The theory was advanced in an early English case that, inasmuch as a husband and wife were legally one, the testimony of the wife of an accomplice was insufficient to corroborate him. This reasoning has not been generally followed, and it is held, both under the common-law rule and the statutes requiring corroboration of accomplices, that the testimony of the wife of an accomplice, who was not herself *particeps criminis*, may be sufficient corroboration of her husband's testimony. *Woods v. State* (1884) 76 Ala. 35, 52 Am. Rep. 315; *Edmonson v. State* (1888) 51 Ark. 115, 10 S. W. 21; *Williams v. State* (1882) 69 Ga. 11; *Blackburn v. Com.* (1876) 12 Bush, 181; *Haskins v. People* (1857) 16 N. Y. 344; *Rex v. Willis* (reported herewith) *ante*, 612.

In *Woods v. State* (1884) 76 Ala. 35, 52 Am. Rep. 315, *supra*, where it was held that the testimony of the wife of an accomplice might be legally regarded as corroboration of the testimony of the
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accomplice himself, under a statute prohibiting a conviction of a felony on the uncontradicted testimony of an accomplice, and that the degree of weight which should be given it was for the jury, the court said: "The third charge requested by the defendants, and refused by the court, raises the question as to whether the testimony of the wife of an accomplice may be legally regarded as a corroboration of the testimony of the accomplice himself, within the meaning of § 4895 of the Code, which prohibits a conviction of felony on the uncorroborated testimony of an accomplice. It has been held in an English case, comparatively modern, that confirmation by the wife is 'no confirmation at all,' the wife and the accomplice being only taken as one. *Rex v. Neal* (1835) 7 Car. & P. 168; 3 Russell, Crimes, 9th ed. 608. Mr. Phillipps observes of this case that its circumstances 'might have been such as to warrant this decision.' 'But,' he adds, 'it may often happen that the evidence of the wife is so free from suspicion, so independent of the evidence of the husband, so manifestly unconcerted and uncontrived, and so undesignedly corroborative of his evidence, that it might be proper not to consider the accomplice and his wife as one, but to act upon her evidence as sufficient corroboration.' 1 Phillipps, Ev. 33. The only ground upon which the rule declared in *Rex v. Neal* can be reasonably sustained would seem to be that the interests of the husband and wife are so nearly identical, and the domination of the former over the latter so powerful and irresistible, that she must necessarily be warped in her testimony by the potency of these considerations, regardless of the sanctity of her oath. There is much force in this view, but it is based rather upon theoretical than practical reasons, and finds little or no support among the adjudged cases in this country. It is a corollary from the proposition of the ancient common law, holding to the abrogation of the wife's legal entity by a complete merger of it into that of her husband,—a theory which has been modified by recent legislation, and the changed status of the wife, as wrought by the refining usage of a more cultured civilization. The wife, under our laws, may be the owner of her separate estate, in a more real sense than ever before. She may dispose of it by will, so as to cut off the claims of her husband, thus rendering her, to a great extent, financially independent of him. She may be declared a 'free dealer' by a court of chancery, so as to invest her with important powers over her own property, whenever her interests require it. She may procure the removal of her husband from the trusteeship of her property, when his conduct shows him to be unfit for its management. So, she may be divorced from her husband upon the grounds of his cruelty to, or abandonment of, her. Nor is the husband's power of corporal punishment over her now recognized, as it seems to have been in the early history of the com-

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mon law. The American authorities generally support the view that the testimony of the wife may be a satisfactory and sufficient corroboration of her husband, who testifies as an accomplice, within the discretion of the jury, so as to warrant a conviction, in cases where such corroboration is requisite. The fact of the relationship, and the danger of marital domination on the part of the husband, go, it is true, largely to assail the credibility of the wife, but not to her competency; and the degree of weight which should be accorded to her testimony must be left to the jury. It may sometimes constitute a very weak corroboration, yet it cannot justly be said to be absolutely no corroboration at all."

And under a statute prohibiting a conviction on the testimony of an accomplice unless corroborated by other evidence, the testimony of the wife of the accomplice testifying may be sufficient to corroborate her husband. *Edmonson v. State* (1888) 51 Ark. 115, 10 S. W. 21.

And in *Haskins v. People* (1857) 16 N. Y. 344, it was held that the evidence of an accomplice, who testified on the trial of another accomplice might be corroborated by the witness's wife, who was not implicated in the alleged offense.

And in *Dill v. State* (1876) 1 Tex. App. 278, where a *nol. pros.* was entered against an accomplice, it was held that his testimony might be corroborated by that of his wife.

And the court in *Blackburn v. Com.* (1876) 12 Bush, 181, stated that the decision in *Rex v. Neal* (1835) 7 Car. & P. 168, set out *infra*, did not commend itself to their judgment if it was understood as deciding that, when there are no grounds for suspecting the complicity of the wife, she may not be received to corroborate her husband when he is an accomplice, and it was held that the testimony of the wife of an accomplice was admissible and sufficient to corroborate him.

And in *State v. Moore* (1868) 25 Iowa, 128, 95 Am. Dec. 776, there was held no error in refusing the defendant's requested instruction that an accomplice could not be corroborated by his wife, the court stating that to have given such instruction would have been in substance to have told the jury to disregard the wife's testimony, instead of leaving the jury to judge of its credibility.

In *United States v. Horn* (1862) 5 Blatchf. 102, Fed. Cas. No. 15,389, where an accomplice testified against the defendant, an instruction was approved that, although the wife of the accomplice, who was not a party to the crime, could not corroborate and strengthen her husband's particular statements, she was a competent witness to prove any independent facts, not sworn to by her husband, and not forming any part of his acts, although those facts fastened a guilty knowledge on the defendant. The court stated that they

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were not prepared to say whether they would, upon full deliberation, affirm the doctrine laid down in *Rex v. Neal*, *infra*, to be correct, but that for the purpose of the case they had no hesitation in affirming the particular instruction given.

In the English case referred to, *Rex v. Neal* (1835) 7 Car. & P. 168, which was an indictment for stealing a sheet found in the house of an accomplice, who testified as to who stole the sheet, it was held that his testimony could not be confirmed by that of his wife, Park, J., briefly stating that confirmation by the wife in such a case was really no confirmation, as the wife and accomplice must be taken as one.

It will be observed that in the reported case (*REX v. WILLIS*, *ante*, 612), where the testimony of the wife of an accomplice, who did not testify, was held good corroboration of the testimony of another accomplice, the court distinguished *Rex v. Neal*, *supra*, on the ground that there the accomplice, whose wife's evidence was held inadmissible as corroboration, was the witness whom she was tendered to corroborate.

In *State v. McIntire* (1882) 58 Iowa, 572, 12 N. W. 593, it was held that the testimony of the wife of a prisoner in the penitentiary, who was not shown to have aided in or had knowledge of the crime charged in the indictment, might be insufficient to corroborate an accomplice of the defendant.

II. Corroboration by testimony of accomplice.

On the theory that accomplices are contaminated by the same guilt and infamy, and that the same infirmity attaches to all alike, it is well settled, both under the common-law rule and the statutes requiring corroboration of the testimony of an accomplice, that if two or more accomplices testify, the same corroboration is required as if there were but one, and that an accomplice can corroborate neither himself nor another accomplice.

UNITED STATES.—*United States v. Logan* (1891) 45 Fed. 872, reversed on other grounds in (1892) 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *United States v. Hinz* (1888) 35 Fed. 272.

ARKANSAS.—*Edmonson v. State* (1888) 51 Ark. 115, 10 S. W. 21.

CALIFORNIA.—*People v. Creegan* (1898) 121 Cal. 554, 53 Pac. 1082; *People v. Bunkers* (1905) 2 Cal. App. 197, 84 Pac. 364, 370.

IOWA.—*Johnson v. State* (1853) 4 G. Greene, 65.

KENTUCKY.—*Powers v. Com.* (1901) 110 Ky. 386, 53 L.R.A. 245, 61 S. W. 735, 13 Am. Crim. Rep. 464; *Howard v. Com.* (1901) 110 Ky. 356, 61 S. W. 756, 13 Am. Crim. Rep. 533; *Porter v. Com.* (1901) 22 Ky. L. Rep. 1657, 61 S. W. 16; *Blackburn v. Com.* 10 B. R. C.

(1876) 12 Bush, 181; *Lane v. Com.* (1909) 134 Ky. 519, 121 S. W. 486.

MONTANA.—*State v. Spotted Hawk* (1899) 22 Mont. 33, 55 Pac. 1026.

NEW YORK.—*People v. O'Farrell* (1903) 175 N. Y. 323, 67 N. E. 588; *People v. Vollero* (1919) 108 Misc. 635, 178 N. Y. Supp. 787.

OKLAHOMA.—*Cudjoe v. State* (1916) 12 Okla. Crim. Rep. 246, L.R.A.1916F, 1251, 154 Pac. 500.

PENNSYLVANIA.—*Com. v. Simon* (1910) 44 Pa. Super. Ct. 538.

TEXAS.—*McConnell v. State* (1892) — Tex. App. —, 18 S. W. 645; *Wallace v. State* (1905) 48 Tex. Crim. Rep. 318, 87 S. W. 1041; *Schwartz v. State* (1908) 55 Tex. Crim. Rep. 36, 114 S. W. 809; *Eddens v. State* (1905) 47 Tex. Crim. Rep. 529, 84 S. W. 828; *Gonzales v. State* (1880) 9 Tex. App. 374; *Heath v. State* (1879) 7 Tex. App. 464; *Holmes v. State* (1913) 70 Tex. Crim. Rep. 214, 156 S. W. 1172; *Gutierrez v. State* (1915) 76 Tex. Crim. Rep. 189, 173 S. W. 1025; *Carzinae v. State* (1921) 88 Tex. Crim. Rep. 468, 227 S. W. 1102; *Westbrook v. State* (1921) 88 Tex. Crim. Rep. 466, 227 S. W. 1104; *Rutcliff v. State* (1921) 89 Tex. Crim. Rep. 176, 229 S. W. 857.

VIRGINIA.—*Jones v. Com.* (1911) 111 Va. 862, 69 S. E. 953; *Draper v. Com.* (1922) — Va. —, 111 S. E. 471.

ENGLAND.—*Rex v. Noakes* (1832) 5 Car. & P. 326.

The court in *Johnson v. State*, *supra*, said: "In the case of *Ray v. State* (1848) 1 G. Greene, 316, 48 Am. Dec. 379, this court decided that a conviction could not take place upon the uncorroborated testimony of an accomplice. This we believe to be the settled doctrine of the books. Can one accomplice be corroborated by another accomplice? If so, then upon the testimony of accomplices, uncorroborated, persons can be convicted. It is just as necessary that the corroborating witness should be strengthened and confirmed, as that the principal one should be, and however abundant this kind of testimony, the accomplice first called is still uncorroborated, and his testimony entitled to no credit. The law regards accomplices in cases of felony, when called to testify, as impeached witnesses, and hence their testimony is of no effect, unless confirmed by other testimony. As one impeached witness cannot support the testimony of a witness previously impeached, it follows that one accomplice cannot be a witness to corroborate the testimony of another accomplice in the same crime."

It has been held that it is especially true that the testimony of one accomplice cannot be considered as corroborative of that of another, where they have been confined in the same jail and had an opportunity to prepare a uniform story. *State v. Williamson* (1875) 42 Conn. 261.

J. T. W.

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[ENGLISH DIVISIONAL COURT.]

JONES, *Appellant*, v. GUARDIANS OF NEWTOWN and
LLANIDLOES, *Respondents*.

[1920] 3 K. B. 381.

*Husband and wife — Desertion by wife — Subsequent lunacy of wife —
Liability of husband for maintenance.*

Where a wife leaves her husband without justification his obligation to support her is, except where she has been guilty of adultery, not put an end to, but only suspended so long as she continues wilfully to absent herself, and if during her absence she becomes a lunatic, then, as she is no longer capable of volition, her continued absence is not wilful, and her husband's liability to maintain her will revive.

(June 8, 1920.)

CASE stated by justices of the county of Montgomery.

A complaint was preferred by the respondents under § 5 of the Poor Law Amendment Act 1850, against the appellant, William Jones, calling upon him to show cause why he should not be ordered to maintain or contribute to the maintenance of his wife, Margaret Jones, who was a pauper lunatic and was being maintained in the county asylum at the expense of the Union.

[382] It appeared that the appellant was married in the year 1888 or 1889. About six or seven years after the marriage his wife left him of her own accord, and from that date down to the time of her lunacy, except for a period of about five weeks in the year 1896, she absented herself from his house and refused to return to him. There was no evidence as to the reasons for which she left him, but it was admitted for the purposes of the case that she did so, and continued to remain absent, without any good cause or excuse. There was no suggestion that she had at any time been guilty of adultery. In July, 1919, she became insane and was removed to the county asylum at Bicton, where she was thenceforward maintained. On February 9, 1920, the respondents took these proceedings against the appellant. The justices made an order that he should pay to the respondents the sum of 15s. 9d. per week from the date when his wife became chargeable as a lunatic.

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Langman, for the appellant. The obligation of a husband to pay for the maintenance of his wife, who has become chargeable to the Union, must be precisely the same whether she is a lunatic or sane, and the circumstances which would relieve him from the obligation to maintain her in a workhouse must equally relieve him from the obligation to maintain her in an asylum. He is not liable under the poor law to pay for her maintenance in a workhouse if she has been guilty of adultery. *Rex v. Flintan* (1830) 1 Barn. & Ad. 227, 109 Eng. Reprint, 771, 9 L. J. Mag. Cas. 33; *Culley v. Charman* (1881) L. R. 7 Q. B. Div. 89, 50 L. J. Mag. Cas. 111, 45 L. T. N. S. 28, 29 Week. Rep. 803, 45 J. P. 768. For the same reason he is not liable if she wrongfully deserts him. In both cases she has discentitled herself to the position and rights of a wife. If she is justified in leaving and refusing to return, her husband will be liable to maintain her even during her absence (*Thomas v. Alsop* (1870) L. R. 5 Q. B. 151, 39 L. J. Mag. Cas. N. S. 43, 21 L. T. N. S. 715, 18 Week. Rep. 454, 21 Eng. Rul. Cas. 343); it is otherwise if she is not so justified. (*Fordham v. Young* (1888) 53 J. P. 133; *Johnston v. Sumner* (1858) 3 Hurlst & N. 261, 27 L. J. Exch. N. S. 341, 4 Jur. N. S. 462, 6 Week. Rep. 574). Here it is admitted for the purposes of the case that Margaret Jones was not justified in leaving her husband.

[383] **Giveen**, for the respondents. A husband's common-law liability to maintain his wife cannot be put an end to except by her adultery. The case of desertion stands upon a wholly different footing. All that such authorities as *Fordham v. Young* (1888) 53 J. P. 133, decide, is that if a husband offers to support his wife in his own house she cannot insist on being supported elsewhere, and the guardians, in the event of her becoming chargeable to the Union, cannot be in a better position. The desertion by her of her husband does not put an end to his liability to maintain her, it only suspends it. However long she may remain away she can always go back, provided she has not been guilty of adultery, and claim that he shall maintain her. It is her wilfully remaining away from the home that temporarily suspends her right to maintenance. Lunacy deprives her of volition, and as the continuance of a lunatic's absence from home cannot be wilful, her husband's

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duty to maintain will revive on her becoming insane. In *Bradshaw v. Beard* (1862) 12 C. B. N. S. 344, 142 Eng. Reprint, 1175, 31 L. J. C. P. N. S. 273, 8 Jur. N. S. 1228, 6 L. T. N. S. 458, where a wife deserted her husband without excuse, and while still absent from him died, it was held that he was liable to pay for the expense of her burial. If she had elected to return to him just before her death he would clearly have been bound to pay for it. His liability was held not to be affected by the fact that her power of election was taken away by death. The result must be the same when the power of election is taken away by insanity. The husband must in such a case be just as much liable to support his wife's living body as to bury it when dead.

Langman, in reply. It surely cannot be that if a wife who deserted her husband becomes chargeable to the Union he cannot be called upon to support her in the workhouse, but that if while there she becomes insane and is removed to an asylum he can be ordered to pay for her maintenance. The duty of a husband to bury the dead body of his wife who had deserted him seems to stand on a peculiar footing.

Earl of Reading, Ch. J.: This case raises an important question as to the obligation of a husband to maintain his [384] wife after she has left him if, whilst still absent, she becomes a lunatic and chargeable to the Union. The facts, so far as material, may be quite briefly stated. Margaret Jones more than twenty years ago left her husband of her own free will without just cause or excuse. In 1919 she became a lunatic, and the guardians of the Union who were maintaining her in the asylum obtained an order from the justices that her husband was liable to pay them the sum of 15s. 9d. a week as being the cost of that maintenance. The question is whether as matter of law that order should stand. It is contended on behalf of the husband that as soon as the wife left the home of her own accord and without excuse his obligation to maintain her came to an end. It is said that his position was in this respect just the same as if she had been guilty of adultery, and it is well settled upon the authorities that where a wife has committed adultery which her husband has not condoned he ceases to be under any obligation to maintain her. Although there does

not appear to be any authority directly in support of the view taken by the justices, I am of opinion their view is correct. There is no doubt that at common law if a wife chooses wilfully and without justification to live away from her husband she cannot, so long as she continues absent, render him liable for necessities supplied to her, or for her maintenance by the Union, for the reason that she has of her own free will deprived herself of the opportunity which the husband was affording her of being maintained in the home. But the relief of the husband from the obligation of maintenance continues only so long as she voluntarily remains absent. Her absence, although wrongful, does not affect the relationship of husband and wife. She is entitled after however long a period of absence to return at any time. There is in the present case no suggestion of the wife having misconducted herself in the sense of having committed adultery. She simply left her home and lived apart. Suppose she were to recover from her insanity and elect to return, it seems clear that the husband would be bound to maintain her. Nothing has happened to dissolve the relationship of husband and wife. Here the [385] wife has become a lunatic and continues to be insane. She is therefore unable to exercise any judgment. She cannot elect to return home, and while in that condition she becomes chargeable to the Union. In those circumstances who ought to support her—the ratepayers or the husband? I think the answer is that so long as the relationship of husband and wife continues it is the husband. This appeal must be dismissed.

Shearman, J.: I am of the same opinion. The case presents some little difficulty and is bare of direct authority, but I think it must be decided upon the cardinal principle that by the common law of England a husband is bound to support his wife. Marriage is not a mere civil contract, but confers a status upon the parties with corresponding obligations. When a wife becomes destitute, and the guardians undertake her support, one result of the obligation arising from the husband's status is that they may have recourse against him. To the general principle that the husband is bound to maintain his wife there is one exception, and that is where the wife is guilty of adultery, in which case the husband is

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discharged from all liability thereafter to maintain her or to recoup the guardians for her maintenance. That is definitely established by *Rex v. Flintan* (1830) 1 Barn. & Ad. 227, 109 Eng. Reprint, 771, 9 L. J. Mag. Cas. 33, and *Culley v. Charman* (1881) L. R. 7 Q. B. Div. 89, 50 L. J. Mag. Cas. 111, 45 L. T. N. S. 28, 29 Week. Rep. 803, 45 J. P. 768. But that is, so far as I am aware, the only case in which the husband's obligation is permanently determined. Where the wife voluntarily and without just excuse leaves her husband, so long as she of her own free will remains absent she cannot pledge his credit for necessaries, and the guardians cannot obtain a maintenance order against him in the event of her becoming chargeable. Her desertion of her husband does not, like her adultery, determine his obligation, it only suspends it during the time that she wilfully absents herself. Here, she might have returned to her husband and called upon him to maintain her at any time before she became insane. Upon her becoming insane her freedom of will came to an end, her absence from [386] her home ceased to be wilful, with the consequence that her husband's obligation to maintain her revived. It seems to me that the justices decided this case rightly, and that the appeal must be dismissed.

Sankey, J.: I agree. When a wife who has left her husband becomes lunatic it is wrong to say that she is refusing to live with her husband, and it is open to the justices to make an order under § 5 of the Poor Law (Amendment) Act 1850.

Appeal dismissed.

Solicitor for the appellant: *E. A. Howell, for Simons, Smythe, & Daniel, Merthyr Tydfil.*

Solicitor for the respondents: *C. Everett, for Williams, Gibbins, & Taylor, Newtown.*

Note.—Liability of husband for support of wife who, after deserting him, becomes insane.

Generally as to liability of husband for support and care of insane wife, see annotation to *Martin v. Beuter*, 4 A.L.R. 1109.

As to insanity as affecting divorce for desertion, living apart, or nonsupport, see annotation to *Wright v. Wright*, 4 A.L.R. 1333.

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As to defenses available to husband in civil suit by wife for support, see annotation to *Hubbard v. Hubbard*, 6 A.L.R. 6.

For a note on liability of husband for necessities furnished wife while living apart from him, see annotation to *Denver Dry Goods Co. v. Jester*, L.R.A.1917A, 958.

It is a well-settled general rule that a husband cannot be held liable for the maintenance of his wife where she has deserted him without just cause or excuse, her absence in such case being wilful. The reported case (*JONES v. NEWTOWN*, *ante*, 623) raises an interesting exception to this rule. It was there decided that, although the liability of a husband for his wife's support was suspended by her desertion without excuse, yet his liability for her maintenance was revived where she subsequently became insane, since she was then incapable of volition and her continued absence was not, therefore, voluntary or wilful.

There is little authority on the question under consideration.

The decision in the reported case (*JONES v. NEWTOWN*) is indirectly supported by the remarks of the court in *Goodale v. Lawrence* (1882) 88 N. Y. 513, 42 Am. Rep. 259, where in an action to recover from a husband for the support of his insane wife, whom he had neglected to support, and had permitted to leave his home while insane, he was held liable for her support. The court said: "It is undoubtedly true that a husband is only bound to support his wife at his own home; and when he is both able and willing to support her there and she wilfully abandons him, she does not carry with her the credit of the husband, nor can she impose any liability upon him. . . . But an insane wife is incapable of abandoning her husband. When a wife is suffering under such affliction, it is the duty of the husband—a duty imposed by the relation he bears to her as well as by the plainest dictates of humanity—to protect and support her. This duty the testator neglected. He permitted his wife to wander from his home when insane; he allowed her to be adjudged a lunatic by proceedings taken in a distant county, and to remain in the custody of a committee appointed of her person and estate until her separate estate was exhausted, never himself contributing a penny to her support; and, although abundantly able to support her, he suffered her to become an object of public charity and to find a home in a poorhouse, where he never visited her and where he never even made himself known as her husband."

But in a case where a wife, while sane, without her husband's consent, went to live with her children and continued so to live until she became insane, it was held that the husband was not liable for the cost of her maintenance at the county asylum, it appearing that he was not served with notice of the proceedings for her commitment, and evidence being offered of his willingness to support her in a

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proper manner. *Monroe County v. Budlong* (1868) 51 Barb. 493. The court here said: "Proof also that his wife deserted his house without cause and against his will, and that he was at all times able and ready and willing to support her in a proper manner, should, I think, have been received. It seems to me that this proof, of itself, would have established a complete defense to the action. A husband who is ready, able, and willing to support his wife, who gives her no just cause or occasion to abandon him or leave his bed and board, cannot be compelled to support her elsewhere than at his own house and home, if he has one, by any private person, or by the town or county, whether she be sane or insane. His liability for necessities provided by other persons for her support rests entirely upon the ground of his neglect or default." J. T. W.

[ENGLISH COURT OF APPEAL.]

IN RE EXPRESS ENGINEERING WORKS, LIMITED.

[1920] 1 Ch. 466.

Also Reported in [1920] W. N. 75, 36 Times L. R. 275.

Corporations—Debentures—Directors disqualified by interest in transaction—Power of board constituting whole body of stockholders—Waiver of technicalities.

Notwithstanding a provision of the articles of a company that no director shall vote as a director in respect of any matter in which he may be interested, the issue of debentures of the company to a syndicate composed of the five directors of the company, who were the only stockholders, in payment for property, is valid, although the meeting at which the issue was authorized by the unanimous vote of the parties was described as a board meeting, since they owned all of the stock, and might have turned the meeting into a general one.

(February 12, 1920.)

[467] APPEAL from a decision of Astbury, J.

The company was registered as a private company on February 26, 1918. It was formed with the object of acquiring certain assets from a syndicate consisting of five persons who, a few days before the company was formed, had purchased them for 7,000*l.* These five persons were the only shareholders of the company, two of them being signatories of the memorandum of association. On March 11, 1918, a meeting, described in the minutes as the first
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board meeting, was held, at which all the five shareholders were present, and they were then and there appointed as directors. The meeting then resolved that the company should purchase the assets of the syndicate for 15,000*l.*, to be paid for by the issue of debentures for that amount, bearing interest at 12 per cent. The debentures were issued, and on March 25, at a further meeting, the seal of the company was affixed to them. They were afterwards transferred to a syndicate called the General Maritime Trust, *Ld.*, which consisted of four of the members of the company. Art. 9 of the company's articles provided that a director might contract with, and be interested in any contract or arrangement with the company, but no director should, as a director, vote in respect of any contract or arrangement in which he might be interested. In March, 1919, the company was ordered to be wound up, and a summons was taken out by the liquidator for a declaration that the issue and transfer of the debentures were invalid and should be set aside. There was no suggestion of any intention on the part of the corporators of defrauding subsequent shareholders or creditors.

Astbury, J., dismissed the summons on the ground that, every member of the company having assented to the transaction, the company was bound in a matter *intra vires* by the unanimous agreement of its members.

The liquidator appealed.

[468] Clauson, K.C., and P. B. Morle, for the liquidator. Those who take advantage of the statutory power to form a private company must conform to the rules in accordance with which the business of such a body must be transacted. In order to bind the company the issue of these debentures must have been sanctioned by a duly constituted general meeting. For the purpose of binding a company in its corporate capacity, the mere individual assent of the corporators does not take the place of a resolution properly passed at a duly constituted meeting. *In re George Newman & Co.* [1895] 1 Ch. 674, 686, 64 L. J. Ch. N. S. 407, 12 Reports, 228, 72 L. T. N. S. 697, 43 Week. Rep. 483, 2 Manson, 267.

It may be admitted that if these five persons had chosen to do so, they might have put themselves in order by waiving technicalities

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as to notice and constituting themselves as a meeting of shareholders; but they did not do so, and the consequence is that the issue of the debentures, not having been sanctioned by a general meeting, is invalid. Whether or not all the corporators could waive all questions of notice, they could not waive this, that the company must act through its regular organ,—i. e., a general meeting. The sanction of the individual corporators is not enough; it must be expressed at a general meeting of the company. The debentures were never validly issued so as to bind the company. It is submitted that the case is covered by *In re George Newman & Co.*

Maugham, K.C., and P. F. Wheeler, for the respondents. Assuming all that has been urged on behalf of the appellant to be correct, it is submitted that the agreement for the sale of the assets in consideration of the issue of the debentures is not void, but only voidable. The company has had the benefit of the assets, and cannot now dispute the validity of the debentures. The question is whether the company or its contractors have not so acted as to prevent the transaction being avoided. *Erlanger v. New Sombrero Phosphate Co.* (1878) L. R. 3 App. Cas. 1218, 39 L. T. N. S. 269, 27 Week. Rep. 65, 6 Eng. Rul. Cas. 777. The liquidator cannot approbate and reprobate. The company must be taken to have ratified [469] the transaction. The right to rescission is gone as it was in *Salomon v. Salomon & Co.* [1897] A. C. 22, 65 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 Week. Rep. 193, 4 Manson, 89. The technical point that the directors could not vote is equivalent to what happened in *Salomon's Case* [1897] A. C. 22, 65 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 Week. Rep. 193, 4 Manson, 89. The agreement could be, and, it is submitted, was, in effect, ratified by the whole body of corporators.

[**Younger, L.J.,** referred to *Broderip v. Salomon* [1895] 2 Ch. 323, 327.]

If the secretary had written into the minutes, "At this point the meeting was turned into a meeting of shareholders," all would have been in order.

Morle, in reply. The meeting of March 11 was throughout treated as a meeting of the directors. The transaction was invalid inasmuch as it was not carried out in accordance with the necessary formalities.

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Lord Sterndale, M.R. (after stating the facts): It was contended, on the one hand, that the issue of the debentures was invalid for this reason, that all the directors being interested parties were precluded by art. 9 from voting, and that though five persons acting together as corporators undoubtedly could make the contract, they could only do so in a properly constituted general meeting. On the other hand it was argued that the contract could not be called invalid if every shareholder knew of and sanctioned it; and, further, that whatever the draftsman of the minutes may have styled the meeting, it was in fact a meeting of all the corporators, and they were able, whatever they might call themselves, to waive technicalities and meet together and make any contract they chose. As authority for that the appellant relied upon what was said by Lindley, L.J., in delivering the judgment of the court in *In re George Newman & Co.* [1895] 1 Ch. 674, 686.

"It may be true, and probably is true, that a meeting, if held, would have done anything which Mr. George Newman desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is [470] entitled to insist upon and to have the benefit of the fact that even if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting."

There were, however, two differences between that case and the present one. First, the transaction there was *ultra vires*, and, secondly, in that case there never was a meeting of the corporators. In the present case these five persons were all the corporators of the company, and they did all meet, and did all agree that these debentures should be issued. Therefore it seems that the case came within the meaning of what was said by Lord Davey in *Salomon v. Salomon & Co.* [1897] A. C. 22, 57: "I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter *intra vires* by the unanimous agreement of its members." It is true that a different question was there

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under discussion, but I am of opinion that this case falls within what Lord Davey said. It was said here that the meeting was a directors' meeting, but it might well be considered a general meeting of the company; for although it was referred to in the minutes as a board meeting, yet if the five persons present had said, "We will now constitute this a general meeting," it would have been within their powers to do so, and it appears to me that that was in fact what they did. The appeal must therefore be dismissed.

Warrington, L.J. (after stating the facts): It happened that these five directors were the only shareholders of the company, and it is admitted that the five, acting together as shareholders, could have issued these debentures. As directors they could not, but as shareholders acting together they could have made the agreement in question. It was [471] competent to them to waive all formalities as regards notice of meetings, etc., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question. Inasmuch as they could not in one capacity effectually do what was required, but could do it in another, it is to be assumed that as business men they would act in the capacity in which they had power to act. In my judgment they must be held to have acted as shareholders, and not as directors, and the transaction must be treated as good as if every formality had been carried out. I agree that the appeal should be dismissed.

Younger, L.J.: I am of the same opinion. I am content to rest my conclusion upon what was said by Lord Davey in *Salomon's Case* [1897] A. C. 22, 57, 65 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 Week. Rep. 193, 4 Manson, 89, that a company is bound in a matter which is *intra vires* by the unanimous agreement of all the corporators. No fraud is alleged in respect of this transaction, and it seems to me that the effect of the resolution of March 11 was that the company by the voice of all its shareholders became bound by this agreement, and I agree with the view that when all the shareholders of a company are present at a meeting that becomes a general meeting and there is no necessity for any further formality to be observed to make it so. In my opinion

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ion the true view is that if you have all the shareholders present, then all the requirements in connection with a meeting of the company are observed, and every competent resolution passed for which no further formality is required by statute becomes binding on the company. Moreover, if this agreement were ever impeachable it was only so as being voidable, and the liquidator, therefore, could only succeed if he were in a position to return the assets. I am, however, of opinion that the agreement was never at any time either void or voidable. All the shareholders were bound by it. I agree that the appeal should be dismissed.

Solicitor for the appellant: *F. H. Stollard.*

Solicitors for the respondents: *Roney & Company.*

Note.—Corporations: meeting of directors constituting whole body of stockholders as meeting of stockholders.

As to casual meeting of directors as a meeting of the board, see annotation to *Barron v. Potter*, 7 B. R. C. 383.

It will be observed that in the reported case (*RE EXPRESS ENGINEERING WORKS*, *ante*, 629), where five persons, who were directors and constituted all of the incorporators of a company, voted at a so-called directors' meeting to issue certain debentures in payment for property owned by a syndicate consisting of the same five persons, the issuance of the debentures was held valid in accordance with the vote, notwithstanding a provision of the articles that no director should, as a director, vote in respect of any contract in which he might be interested, the court holding that, although the meeting in question was called a directors' meeting the parties might have turned it into a stockholders' general meeting, at which it was admitted they would have had power to have authorized the issue of the debentures.

This decision finds some support from cases involving somewhat analogous situations, but there is little direct authority upon the question under consideration.

In *Union Nat. Bank v. Shoemaker* (1897) 68 Mo. App. 592, where three brothers were the owners of all of the stock of a corporation, and occupied all of the offices of the company, a sale of its entire property was held valid upon its appearing that, before the sale, at what they termed a directors' meeting, the three unanimously adopted a resolution authorizing the president to make the sale; the court holding that, regardless of the validity of their acts as officers

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or agents, their unanimous consent as stockholders rendered the transaction binding.

And in *Pacific State Bank v. Coats* (1913) 123 C. C. A. 634, 205 Fed. 618, Ann. Cas. 1913E, 846, where the president and secretary were the sole stockholders and trustees of a corporation, and they executed a mortgage of the company's property to secure a loan to it, the mortgage was held not invalid because the two did not convene in a board meeting and resolve that they be authorized to execute the mortgage. The court said: "In the case at bar we have the president and secretary, who are not only the sole trustees of the corporation, but its sole stockholders, receiving money to the use and benefit of the corporation, and executing a mortgage on the company's property to secure the payment thereof; and they attach the corporate seal. To what other source could one look for corporate power to do the thing that was done? And then we have the apparent authority and the ratification. Can it be that this instrument is void, and will be so declared by a court of justice, because these two stockholders, officers and trustees, did not convene in board meeting, and solemnly declare and resolve that they, as officers, be authorized to execute the instrument given to secure moneys that such officers received to the use and benefit of the corporation? It could hardly seem so. In such a case the act of meeting together and authorizing themselves to do the thing we call executing the mortgage becomes a mere formality which the law does well to disregard, and the mortgage ought not to, and will not be, held to be a nullity because of the omission of the formality."

And in *Gerard v. Empire Square Realty Co.* (1921) 195 App. Div. 244, 187 N. Y. Supp. 306, where directors owned all the stock of a corporation, their action separately, and not as a body, on a contract, was held binding on the corporation, despite the rule that directors acting separately cannot bind the corporation, the court stating that if the directors own all the stock the reason for the rule that the directors are given power as agents of the stockholders to act only as a board disappears, since they are both principals and agents, and their unanimous acts as directors carry their consent thereto as stockholders.

Attention may also be called to *Re Oxted Motor Co.* [1921] 3 K. B. 32, [1921] W. N. 197, 37 Times L. R. 737, where two persons who were the sole directors and stockholders of a company were held to have power to waive the formalities of the Companies Act, requiring notice to shareholders of intention to propose an extraordinary resolution, and a resolution, signed by the two shareholders, that it had been proved to their satisfaction that the company could not continue its business, was held valid and not open to impeachment by

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creditors. The court here relied upon the decision in the reported case (*RE EXPRESS ENGINEERING WORKS*, *ante*, 629).

In *Re George Newman & Co.* [1895] 1 Ch. 674, 64 L. J. Ch. N. S. 407, 12 Reports, 228, 72 L. T. N. S. 697, 43 Week. Rep. 483, 2 Manson, 267, it was held that even if shareholders of a company could in a general meeting have sanctioned making certain presents to a director who owned practically all of the stock, such right was not given by a resolution of the directors, although it was approved by all of the stockholders.

The court in this case reasoned that although, if a stockholders' meeting had been held, it would probably have done what the one owning most of the stock desired, that this was pure speculation, and that the liquidator, representing the company in its corporate capacity, was entitled to insist upon and have the benefit of the fact that even if the shareholders in a general meeting could have sanctioned what was done they never did so, stating that their individual assents given separately were not equivalent to the assent of the meeting, so far as the company was concerned. In this case there were some shareholders who were not directors, which distinguishes it from the reported case (*RE EXPRESS ENGINEERING WORKS*), where those constituting the board of directors were also the sole shareholders.

J. T. W.

[ONTARIO APPELLATE DIVISION.]

DAVEY v. CHRISTOFF.

36 Ont. L. Rep. 123, 28 D. L. R. 447.

Landlord and tenant—Covenant for quiet enjoyment—Defect in heating appliances.

A defect in the heating appliances of the premises demised, by reason of which the lessee is unable to heat them adequately, is not a breach of a covenant for quiet enjoyment.

—Implied warranty of fitness.

In the case of a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied.

—Lease of theater—Implied warranty of adequacy of heating apparatus.

A letting of premises equipped as a moving picture theater carries with it an implied warranty that they are fit for immediate occupation and use as a theater, which is broken where the heating apparatus proves inadequate to heat the theater during the winter months.

(February 21, 1916.)

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APPEAL by the defendants from the judgment of Masten, J., 35 Ont. L. Rep. 162; and cross appeal by the plaintiff as to the damages awarded to him, which, he contended, should be increased by \$200.

The appeal was heard by Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, J.J.A.

W. A. Henderson, for the appellants.

J. W. Payne, for the plaintiff respondent.

The arguments of counsel are sufficiently stated in the judgment. Counsel referred to some of the cases cited in the judgment, and also to *Naumberg v. Young* (1882) 44 N. J. L. 331, 43 Am. Rep. 380; *McIntosh v. Wilson* (1913) 23 Manitoba L. R. 653, 26 West. L. R. 91, 14 D. L. R. 671; *Miles v. Constable* (1914) 6 Ont. Week. N. 362.

The judgment of the court was delivered by **Meredith, C.J.O.**: This is an appeal by the defendants from the judgment of Masten, J., dated the 17th December, 1913, pronounced after the trial before him sitting without a jury; and there is a cross appeal by the plaintiff as to the damages which were awarded to him, which, he contends, should have been greater by \$200 than the amount which he was held to be entitled to recover.

The facts as to the main question are not seriously in dispute, and are simple:—

[124] The appellants were tenants of a moving picture theater known as "The Temple," 1032 Queen street west, in the city of Toronto, which occupied the ground floor of a building owned by a man named Vogan, and one of the terms of the tenancy was that the appellants were to heat the upper part of the building. The building was heated by means of a furnace or boiler which was situate in that part of the building of which the appellants became tenants. The appellants carried on the moving picture business for about eleven months, when they sublet the theater to the respondent. The lease to the respondent is dated the 8th October, 1914, and is for two years from the 12th day of that month, and one of its terms is that he was to "keep the building other flats heated at his own expense."

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Before deciding to take the lease on the terms offered by the appellants, the respondent visited the theater on several occasions and satisfied himself that the business which was being done there warranted him in accepting the offer, and he told Begoin Christoff, one of the appellants, that he would accept it.

Nothing was said as to the heating of the building until the parties met to have the lease prepared and executed. In discussing the terms, Begoin Christoff told the respondent that he must agree to heat the upper part of the building. The respondent demurred to this, and asked how much coal it would take to heat the place, and the reply was either that 3 tons a month would be sufficient for that purpose or that the quantity the appellants had used was 3 tons a month. The respondent took possession on the 12th October, and was satisfied with the business until the cold weather came on, when it was found that the heating appliances were quite inadequate, not only to supply heat to the upper flats, but insufficient to heat the part of the building rented by the respondent. The result of this was that the attendance at the theater fell off. Complaints as to the heating were made to the appellants, but they refused to do anything to remedy the defects in the heating appliances. The head landlord, Vogau, however, put in a new boiler; but this did not remedy the difficulty. The flue was too small and there was not sufficient draft. No effort was made by the appellants to remedy this defect, and on the 8th January, 1915, the respondent left the premises, and the lease was subsequently surrendered.

[125] The action is brought to recover damages for the loss occasioned to the respondent owing to the insufficiency of the appliances for heating the premises, and in the statement of claim this was alleged to have been a breach of the appellants' covenant for quiet enjoyment. The appellants counterclaim for damages for "breach of covenant to pay rental and carry on the business" and for the respondent's refusal to transfer the license for the theater to the appellants.

The claim that the defect in the heating appliances and the consequences of it constituted a breach of the covenant for quiet enjoyment was manifestly untenable, and the learned trial judge so held, but he also held that there was an implied warranty that

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the heating appliances were adequate for heating demised premises, and that there had been a breach of that warranty, and he awarded damages to the respondent in respect of it.

The learned judge also awarded damages to the appellants on their counterclaim for the refusal to transfer the license, set off these damages against the damages awarded to the respondent, and gave judgment against the appellants for \$350, with costs.

The question as to the implication in such case as this of a warranty that the demised premises are fit for the purpose for which they are intended to be used is an important one, and I have been unable to discover any direct authority in favor of implying such a warranty.

It is abundantly clear, I think, that such a warranty is not to be implied in the case of a demise of realty only.

In *Smith v. Marrable* (1843) 11 Mees. & W. 5, 152 Eng. Reprint, 693, which was the case of letting a furnished house, Baron Parke, after stating that the case involved "the question whether, in point of law, a person who lets a house must be taken to let it under the implied condition that it is in a state fit for decent and comfortable habitation, and whether he (*sic*) is at liberty to throw it up, when he makes the discovery that it is not so," and referring to two earlier cases (*Edwards v. Etherington* (1825) Ryan & M. 268, 7 Dowl. & R. 117, and *Collins v. Barrow* (1831) 1 Moody & R. 112), said: "These authorities appear to me fully to warrant the position that if the demised premises are encumbered with a nuisance of so serious a nature that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up."

[126] In *Sutton v. Temple* (1843) 12 Mees. & W. 52, 152 Eng. Reprint, 1108, 13 L. J. Exch. N. S. 17, which was the case of a demise of the estate of 24 acres of land, it was held that on a demise of land or the vesture of land (as the estate of a field) for a specific term at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken.

In *Hart v. Windsor* (1843) 12 Mees. & W. 68, 152 Eng. Reprint, 1114, 13 L. J. Exch. N. S. 129, 8 Jur. 150, 9 Eng. Rul. Cas. 438, which was the case of an agreement to let a house and
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garden ground, with the use of the fixtures therein, for the term of three years, the defendant pleaded that the house was demised to him for the purpose of his inhabiting it; that before and at the time of the agreement and when he entered, and from thence until and at the time of his quitting and abandoning the possession of it, the house was not in a fit state or condition for habitation, but in that state that the defendant could not reasonably inhabit or dwell therein or have any beneficial occupation of it, by reason of its being greatly infested with bugs, and not by reason of any act or default of the defendant; that before the rent or any part of it became due he quitted the possession, and gave notice thereof to the plaintiff, and ceased all further occupation of the same, and derived no benefit therefrom; and that, from the commencement of the term until his so quitting, he had had no beneficial occupation of the same. The jury having found for the defendant on this issue, it was held, on motion for judgment *non obstante veredicto*, that the plea was no answer to the action, inasmuch as the law implied no contract on the part of the lessor that the house was at the time of the demise, or should be at the commencement of the term, in a reasonably fit state and condition for occupation; secondly, that the demise being of a house and *garden ground*, in order to make the plea good, it must be held that, if a house be taken for habitation, and land for occupation, by the same lease, there is such an implied contract for the fitness of the house for the habitation as that its breach would authorize the tenant to give up both; thirdly, that there is no implied warranty on a lease of a house, or of land, that it is or shall be reasonably fit for habitation, occupation, or cultivation; and that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. The defendant in support of his plea relied chiefly upon *Smith v. Marrable*, and in delivering judgment Baron [127] Parke said that his judgment in that case certainly proceeded upon the authority of the two earlier cases I have mentioned, but that from the full discussion that they had undergone in argument, and in argument in the then recent case of *Sutton v. Temple* (*supra*), he felt satisfied they could not be supported, if the reports of them were correct, and
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that all the members of the court concurred in the opinion that they were not law.

In *Chappell v. Gregory* (1864) 34 Beav. 250-253, 55 Eng. Reprint, 631, the Master of the Rolls (Sir John Romilly) said: "A promise by the lessor to put the house into a complete state of repair before the lease is executed, and upon the faith of which the lease is taken, is a distinct engagement which must be fulfilled by him. But, in the absence of such a promise, a man who takes a house from a lessor takes it as it stands; it is his business to make stipulation beforehand, and if he does not, he cannot say to the lessor, 'This house is not in a proper condition, and you or your builder must put it into a condition which makes it fit for my living in.' Accordingly, in the present case, unless the preliminary promise by Mr. Chappell is established by Mr. Gregory, he must fail; for not only is there no implied warranty in the letting of a house, but in this instance, the defendant had himself previously inspected the house, and knew, or had the opportunities of knowing, what the condition of it was."

In *Searle v. Laverick* (1874) L. R. 9 Q. B. 122, 131, 43 L. J. Q. B. N. S. 43, 30 L. T. N. S. 89, 22 Week. Rep. 367, Blackburn, J., said: "And we know that in the ordinary case of lessor and lessee there is no implied covenant on the part of the landlord to his tenant that the building shall be fit for the purpose for which it is let. See *Hart v. Windsor*" (*supra*).

The same judge, then Lord Blackburn, said, in *Westropp v. Elligott* (1884) L. R. 9 App. Cas. 815, 826: "In the civil law and French law founded on it a lease of land was but one instance of the *locatio rei*, and according to that foreign law a contract on the part of the latter is implied that the thing, whether land or chattel, should be reasonably fit for the purpose for which it was let. There have been several cases in which the question has been discussed whether such a contract on the part of the letter was implied in English law. These cases, or most of them, will be found collected in Sir E. V. Williams's Notes to Saunders, vol. 2, 838. The decision in *Hart v. Windsor* was that there was no such contract on the part of [128] the lessor of real property implied by English law. Now, in every case in

which that question was raised, it must have been first decided that the property was let for a particular purpose."

In *Wilson v. Finch Hatton* (1877) L. R. 2 Exch. Div. 336, 342, which was the case of a furnished house, Kelly, C.B., referring to the cases cited by the plaintiff's counsel, said that all of them were "cases of agreements for the letting and hiring of real property," and that "the circumstances in which furnished houses are, and those in which real property is, demised, differ very greatly;" and Pollock, B., at p. 343, expressed the opinion that, "if this were the case of an agreement for the letting of real property, the well-established rules of law would apply, and they would force us to hold that the tenant could not succeed in this case;" and on p. 344 he said: "The cases which refer to real property do not govern this contract."

In *Manchester Bonded Warehouse Co. v. Carr* (1880) L. R. 5 C. P. Div. 507, 510, 511, which was the case of a lease of floors in a warehouse, Lord Coleridge, Ch.J., delivering the judgment of the court, said: "We are of opinion that the plaintiffs are not liable to damages by reason of any implied covenant or warranty by them that the building was fit for the purpose for which it was to be used. No authority has been found which decides that there is any such warranty; what authority there is on the point is against its existence (*Hart v. Windsor*; *Sutton v. Temple*); and we are of opinion that no such warranty can be implied. There are, it is true, some cases relating to furnished apartments and houses which tend to show that a person who lets them impliedly warrants that they are fit for residential purposes (*Smith v. Marrable* and *Wilson v. Finch Hatton*); but we are not prepared to extend these decisions to ordinary leases of lands, houses, or warehouses, as we must if we are to hold the plaintiffs liable for the fall of this warehouse by reason of any implied covenant or warranty."

This rule was also recognized and acted upon, and *Sutton v. Temple* and *Hart v. Windsor* were followed, in *Murray v. Mace* (1874) Ir. Rep. 8 C. L. 396, and in the leading textbooks on the subject of landlord and tenant; and in Halsbury's Laws of England the rule is stated to be as laid down in those two cases.
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In the United States, also, the rule is recognized and acted upon. Cyc. vol. 24, pp. 1048, 1049.

[129] The only case in which any doubt may be thought to have been suggested as to the application of the rule to the letting of an unfurnished house which, to the knowledge of the lessor, is taken for immediate habitation, is *Bunn v. Harrison* (1886) 3 Times L. R. 146. That was the case of an agreement for the lease of an unfurnished house, and it had been found by the trial judge that the defendant had been induced to become tenant of the house on the faith of a representation and warranty that it was in a sanitary condition, and that the drainage, water supply, and ventilation were all perfect; that the house was at the time of the letting in an insanitary condition, and that the defendant had left within a reasonable time; and the plaintiff's action, which was brought to recover a quarter's rent, was dismissed, and judgment was given for the defendant on her counterclaim for breach of the warranty. The plaintiff appealed, and upon the appeal the defendant's counsel relied upon the express warranty, and also contended that, as the house was for immediate habitation, there was an implied warranty that it was fit for habitation. The appeal was dismissed upon the ground that the warranty that was found to have been given was "not only . . . a warranty, ordinarily so called, but also a warranty which went to the whole root and condition of the contract;" that it was a condition; that there were, therefore, a condition and a warranty; that the condition upon which the defendant was to take the house was broken, and she was not bound to pay the rent, "as she did not take to the house, but left within a reasonable time;" and that there was a breach of the warranty upon which she could recover damages. As to the question of an implied warranty, the Master of the Rolls reserved his opinion until the case arose. Lindley, L.J., said that "it was not necessary to decide whether or not the doctrine of *Smith v. Marrable* and *Wilson v. Finch Hatton* applied, where it was understood by both parties that the unfurnished house was for immediate habitation;" and Lopes, L.J., said that "it was not necessary to express any opinion as to implied warranty in the case of unfurnished as distinct from furnished houses."

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Notwithstanding what was said in this case, in my opinion *Sutton v. Temple* and *Hart v. Windsor* ought to be followed, and, if followed, there is nothing to exclude from the application of the rule there laid down the case of an unfurnished house let for immediate [130] habitation; and it follows from the rule that the doctrine of such cases as *Hamlyn & Co. v. Wood & Co.* [1891] 2 Q. B. 488, 60 L. J. Q. B. N. S. 734, 65 L. T. N. S. 286, 40 Week. Rep. 24, does not apply.

An exception has been made to the rule in the case of furnished houses or apartments let for immediate and temporary occupation, but it is difficult to understand the exact ground upon which the exception is based. It was first applied in *Smith v. Marrable* (*supra*). The letting in that case was of a furnished house for five or six weeks at the option of the tenant, and was for immediate occupation by him. The tenant, who at once entered into possession, finding that the house was infested with bugs, left it and sent the key with a week's rent to the landlord. The landlord sued for use and occupation, claiming to recover a balance of five weeks' rent, and the defense was that there was an implied condition or warranty that there was nothing about the house so noxious as to render it uninhabitable, and the Lord Chief Baron, before whom the action was tried, so directed the jury. A motion for a new trial on the ground of misdirection was made by the plaintiff, but a rule was refused.

As I have already said, Baron Parke based his judgment on the earlier cases I have mentioned, and would have decided in favor of the defendant even if the house had not been a furnished house; but Lord Abinger, C.B., apparently confined his decision to the case of a furnished house, and said: "A man who lets a ready-furnished house surely does so under the implied condition or obligation—call it which you will—that the house is in a fit state to be inhabited. Suppose, instead of the particular nuisance which existed in this case, the tenant discovered the fact—unknown perhaps to the landlord—that lodgers had previously quitted the house in consequence of having ascertained that a person had recently died in it of plague or scarlet fever; would not the law imply that he ought not to be compelled to stay in it? I entertain no doubt whatever on the

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subject, and think the defendant was fully justified in leaving these premises as he did; indeed, I only wonder that he remained so long, and gave the landlord so much opportunity of remedying the evil."

In *Sutton v. Temple* (*supra*), it was sought to apply the decision in *Smith v. Marrable*, but Lord Abinger (p. 60) distinguished it on the ground that the contract in that case was a contract of a [131] mixed nature,—for the letting of a house *and furniture* at Brighton,—and said that everyone knew that the furniture, upon such occasions, forms the greater part of the value which the party renting gives for the house and its contents. "In such a case," said he, "the contract is for a house and furniture fit for immediate occupation; and can there be any doubt that, if a party lets a house, and the goods and chattels or the furniture it contains, to another, that must be such furniture as is fit for the use of the party who is to occupy the house?" And, after referring to some cases by way of illustration, he added (p. 61): "On the same principle, if a party contract for the lease of a house ready furnished, it is to be furnished in a proper manner, and so as to be fit for immediate occupation. Supposing it turn out that there is not a bed in the house, surely the party is not bound to occupy it or to continue in it. So also in the case of a house infested with vermin; if bugs be found in the bed, even after entering into possession of a house, the lodger or occupier is not bound to stay in it. . . . Where the party has had an opportunity of personally inspecting a ready-furnished house by himself or his agent before entering on the occupation of it, perhaps the objection would not arise; but if a person take a ready-furnished house upon the faith of its being suitably furnished, surely the owner is under an obligation to let it in a habitable state. Common sense and common justice concur in that conclusion. On this ground, I put the case of *Smith v. Marrable* out of the question in the present case, from which it is materially distinguishable."

Baron Parke said (p. 65) that *Smith v. Marrable* was distinguishable on the ground upon which the Lord Chief Baron had put it,—“that there the contract was of a mixed nature, being a bargain for a house *and furniture*, which was necessarily to be

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such as was fit for the purpose for which it was to be used. It resembles the case of a ready-furnished room at an hotel, which is hired on the understanding that it shall be reasonably fit for immediate habitation. In such case the bargain is not so much for the house as the furniture, and it is well understood that the house is to be supplied with fit and proper furniture, and that, if it be defective, the landlord is bound to replace it."

Gurney, B. (pp. 65, 66), concurred with some difficulty, because he thought it not easy to distinguish the case from *Smith* [132] v. *Marrable*; but he said that, as it related to land, and not also to goods and chattels, it might admit of some distinction.

Rolfe, B. (67), thought it very probable that the two cases might be distinguished, on the ground pointed out by the Chief Baron and Baron Parke, but that if they were not he would prefer at once to overrule *Smith* v. *Marrable*, rather than to follow it in the case he was dealing with.

In *Hart* v. *Windsor* (*supra*), *Smith* v. *Marrable* was again relied on, and was again distinguished on the ground on which it was put by Lord Abinger, "both on the argument of the case itself, but more fully in that of *Sutton* v. *Temple*; for it was the case of a demise of a ready-furnished house for a temporary residence at a watering place. It was not a lease of real estate merely" (p. 87).

In *Wilson* v. *Finch Hatton* (*supra*), the exception was carried a step farther. There the defect was in the drainage of a furnished house let for a temporary period and for immediate occupation, and it was held that there is in an agreement to let a furnished house an implied condition that the house shall be fit for occupation at the time at which the tenancy is to begin, and that if the condition is not fulfilled the lessee is entitled thereupon to rescind. The Lord Chief Baron came to that conclusion both on the authority of *Smith* v. *Marrable* and "on the general principles of law."

Pollock, B., distinguished the case from one in which the subject of the demise was real property, and said that "although in the case of a furnished house many of the incidents which attach to a demise of realty may be applicable, inasmuch as the rent does, in a sense, issue out of the realty, still the rent paid for the fur-

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nished house such as this is not merely rent for the use of the realty, but a sum paid for the accommodation afforded by the use of the house, with all its appurtenances and contents, during the particular period of three months for which it is taken." The learned Baron, apart from authority, thought it clear that the plaintiffs had "not supplied to the tenant that which both parties intended they should supply," and that the tenant then had "done what she was entitled to do, as she repudiated the contract without delay, . . . "and that *Smith v. Marrable* was good law and furnished the court with an authority for its decision. The real principle, he said, of *Smith v. Marrable*, was unassailed, and he thought was unassailable; "for, as is said in the judgment of Lord Abinger: 'A [133] man who lets a ready-furnished house surely does so under the implied condition or obligation that the house is in a fit state to be inhabited;'" and he added: "It has been assumed, too, that it was the furniture, and not the house, that was infested; but it would seem that that was not the case, and that the animals were found in both." This latter statement is supported by the report of *Smith v. Marrable*, although, as I read Lord Abinger's reasons for judgment, he emphasized the fact that the difficulty complained of was in the furniture.

It is also to be noticed that in *Wilson v. Finch Hutton*, before the agreement was signed, the defendant wrote to the plaintiff's agent to make inquiries as to the state of the drainage, and that the agent wrote in reply that "Mrs. Hale" (*i. e.*, the person for whom the house was held by the plaintiffs as trustees) "believes the drainage to be in perfect order."

I refer also to *Bird v. Lord Greville* (1884) Cab. & El. 317; *Harrison v. Malet* (1886) 3 Times L. R. 58; *Charsley v. Jones* (1889) 53 J. P. 280, 5 Times L. R. 412; *Sarson v. Roberts* [1895] 2 Q. B. 395, 65 L. J. Q. B. N. S. 37, 14 Reports, 616, 73 L. T. N. S. 174, 43 Week. Rep. 690, 59 J. P. 643, and *Campbell v. Wenlock* (1866) 4 Fost. & F. 716, in which Cockburn, Ch.J. (p. 734), told the jury that "upon principles of law there was an implied contract that a furnished house, let for present occupation, should be fit for such occupation."

After much consideration, I have come to the conclusion that
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the letting in the case at bar comes within the exception established by *Smith v. Marrable* and *Wilson v. Finch Hatton*, and that there is to be implied a warranty or condition in the contract between the parties that the theater was fit for immediate occupation and use as a moving picture theater.

The property demised was not realty only, but there were included in the demise the whole contents of the theater, "including 387 seats, more or less, piano, machines, and all other necessary equipment for the operation of the theater." The demise resembles in its essential features that of a furnished house; it was of a furnished theater, the whole let as a going concern and for immediate occupation and use as a moving picture theater. The condition or warranty that it was fit for occupation and use as a moving picture theater was undoubtedly broken. In a climate such as that of Ontario there can be no doubt, I think, that if there were no adequate heating appliances in a furnished house [134] intended to be heated by steam or hot water or air, and let for a period covering the winter months, the house would be unfit for human habitation within the decision in *Smith v. Marrable*, and I can see no difference between such a case and that of a furnished moving picture theater let for immediate occupation and use.

My view that a warranty or condition that the premises demised were fit for immediate occupation and use as a moving picture theater should be implied is, I think, strengthened by the provision of the lease requiring the respondent to heat the upper flats and by the discussion which took place as to the quantity of coal which was required to do the heating,—which indicates that the parties were dealing with premises that were supplied with adequate heating appliances. Indeed, if it were not for the finding to the contrary of the learned trial judge, I should have thought that the evidence warranted the conclusion that there was an express warranty that not more than 3 tons of coal per month would be required to heat the theater and the upper flats, and that there was a breach of that warranty.

I would, for these reasons, dismiss the appeal, with costs, and affirm the judgment of the learned trial judge.

No case was made for disturbing the disposition made of the
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claim of the appellants for damages for the refusal of the respondent to transfer the license; \$200 were awarded for these damages and, upon the finding of fact made by the learned judge upon this branch of the case, were rightly awarded; and the cross appeal should, therefore, be dismissed, with costs.

I have written at greater length than I should have written but for the importance of the question of law involved in the determination of the appeal, and a desire that nothing should be said by the court which would tend to unsettle the well-established rule of law that, in the case of a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied.

Appeal dismissed.

Note.—Implied warranty of fitness of premises leased for business purposes.

I. Scope, 649.

II. Generally, 649.

III. Leases of buildings under construction, 654.

IV. Leases of property containing mines or wells, 656.

V. Leases of property with fixtures and equipment, 658.

VI. Effect of statutes, 659.

I. Scope.

This note deals solely with questions arising out of the unsuitability of business premises for the purpose for which they were leased, and hence does not include cases of personal injury arising from defective premises.

II. Generally.

It is a well-settled rule that at common law there is no implied covenant or warranty that premises leased for business purposes are fit for, or adapted to, the uses to which they are intended to be applied.

UNITED STATES.—*Fellon v. Cincinnati* (1899) 37 C. C. A. 88, 95 Fed. 336 (*dictum* in suit by lessee of railroad to recover for replacement of bridges).

ARKANSAS.—*Little Rock Ice Co. v. Consumers Ice Co.* (1904) 114 Ark. 532, 170 S. W. 241 (factory, defective boilers).

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COLORADO.—*Davidson v. Fischer* (1888) 11 Colo. 583, 7 Am. St. Rep. 267, 19 Pac. 652 (storeroom and cellar, unsound foundation walls).

DISTRICT OF COLUMBIA.—*Keroes v. Richards* (1906) 28 App. D. C. 310, 8 Ann. Cas. 575 (building with defective drain).

ILLINOIS.—*Friedman v. Schwabacher* (1896) 64 Ill. App. 422 (store and basement premises filled with sewer gas); *Blake v. Ranous* (1887) 25 Ill. App. 486 (store, defective plumbing); *Lazarus v. Parmply* (1904) 113 Ill. App. 624 (stock of goods damaged by rain coming through defective roof).

INDIANA.—*Lucas v. Coulter* (1885) 104 Ind. 81, 3 N. E. 622 (rain coming through defective roof in factory and damaging property).

KENTUCKY.—*R. C. H. Covington Co. v. Masonic Temple Co.* (1917) 176 Ky. 729, L.R.A.1918A, 436, 197 S. W. 420 (fall of building damaging goods in storehouse).

MAINE.—*Libbey v. Tolford* (1861) 48 Me. 316 (unsafe condition of leased store).

MASSACHUSETTS.—*Roth v. Adams* (1904) 185 Mass. 341, 70 N. E. 445 (store building in dilapidated condition).

MISSOURI.—*Meade v. Montrose* (1913) 173 Mo. App. 722, 160 S. W. 11 (unsafe roof of premises rented as garage).

MONTANA.—*York v. Steward* (1898) 21 Mont. 515, 43 L.R.A. 125, 55 Pac. 29 (defective plumbing in building leased for storeroom); *Landt v. Schneider* (1904) 31 Mont. 16, 77 Pac. 307 (premises leased as brewery claimed unfit for occupancy).

NEW HAMPSHIRE.—*Scott v. Simons* (1874) 54 N. H. 426 (defective drain of leased store causing damage to stock).

NEW JERSEY.—*Whitcomb v. Brant* (1908) 76 N. J. L. 201, 68 Atl. 1102 (premises leased for restaurant unsuitable without alterations).

NEW YORK.—*Schermerhorn v. Gouge* (1861) 13 Abb. Pr. 315 (unsubstantial, dilapidated, and leaky condition of building leased as store); *Opdyke v. Prouty* (1875) 6 Hun, 242 (stock damaged by leakage in building leased as store); *Edwards v. New York & H. R. Co.* (1885) 98 N. Y. 245, 50 Am. Rep. 659 (defects in building leased for exhibition purposes); *Carey v. Kreizer* (1899) 26 Misc. 755, 57 N. Y. Supp. 79 (presence of mass of timber and rubbish in building apparently rented for business); *Lynch v. Speed* (1889) 15 Daly, 207, 4 N. Y. Supp. 556 (defective floor in stable); *Lyons v. Gavin* (1904) 43 Misc. 659, 88 N. Y. Supp. 252 (premises unfit for dance hall); *Prahar v. Tousey* (1904) 93 App. Div. 507, 87 N. Y. Supp. 845 (leased premises unsafe for lessee's printing presses); *Lusk v. Peck* (1909) 132 App. Div. 426, 116 N. Y. Supp. 1051 (defect in leased bleachers); *Younger v. Campbell* (1916) 158 N. Y. 10 B. R. C.

Supp. 649, reversed on other grounds in (1917) 177 App. Div. 403, 163 N. Y. Supp 609 (unsafe condition of premises leased for lodging houses); *Dadson v. Dixon* (1917) 179 App. Div. 491, 165 N. Y. Supp. 963 (collapse of building leased for manufacturing purposes); *Brown v. DeGraff*, (1918) 183 App. Div. 177, 170 N. Y. Supp. 445 (unsafe condition of premises leased as storehouse, causing collapse).

NORTH CAROLINA.—*Gaither v. Hascall-Richards Steam Generator Co.* (1897) 121 N. C. 384, 28 S. E. 546 (water in basement of premises leased for business, preventing working).

OKLAHOMA.—*Hanley v. Banks* (1897) 6 Okla. 79, 51 Pac. 664 (damage by elements to stock in furniture and undertaking business); *Horton v. Early* (1913) 39 Okla. 99, 47 L.R.A.(N.S.) 314, 134 Pac. 436, Ann. Cas. 1915D, 825 (defective roof on building leased for store); *Enterprise Seed Co. v. Moore* (1915) 51 Okla. 477, 151 Pac. 867 (defective wall and plumbing in building leased for business).

PENNSYLVANIA.—*Carson v. Godley* (1856) 26 Pa. 111, 67 Am. Dec. 404 (defectively constructed building leased for storehouse); *Hazlett v. Powell* (1858) 30 Pa. 293 (windows of building leased for hotel darkened by party wall); *Moore v. Weber* (1872) 71 Pa. 429, 10 Am. Rep. 708 (premises leased for store rendered unfit for business by tearing out part of building); *Wood v. Carson* (1917) 257 Pa. 522, 101 Atl. 811 (insufficient supply of water on premises leased for dyehouse); *Kelly v. Miller* (1915) 249 Pa. 314, 94 Atl. 1055 (access cut off to certain parts of premises leased for theater); *Twibill v. Brown* (1886) 1 Pa. Co. Ct. 350 (premises leased for saloon, formerly used as opium den).

TEXAS.—*Lynch v. Ortlieb & Co.* (1888) 70 Tex. 727, 8 S. W. 515 (walls of building leased to wholesale dealer in notions unsafe).

WASHINGTON.—*Hardman Estate v. McNair* (1916) 61 Wash. 74, 111 Pac. 1059 (*dictum*, in suit involving lease containing warranty to arrange premises for café).

WEST VIRGINIA.—*Charlow v. Blankenship* (1917) 80 W. Va. 200, L.R.A.1917D, 1149, 92 S. E. 318, 17 N. C. C. A. 225 (storeroom having defective roof).

ENGLAND.—*Sutton v. Temple* (1843) 12 Mees. & W. 52, 152 Eng. Reprint, 1108, 13 L. J. Exch. N. S. 17 (leased pasturage unsuitable because of poisonous matter); *Manchester Bonded Warehouse Co. v. Carr* (1880) L. R. 5 C. P. Div. 507 (unfitness of leased warehouse).

CANADA.—*Telfer Bros. v. Fisher* (1910) 3 Alberta L. R. 423 (warehouse unsafe, resulting in collapse).

So, in *Wilkinson v. Clauson* (1882) 29 Minn. 91, 12 N. W. 147, where there was held to be no implied warranty in a lease of a store that it was provided with drainage facilities suitable for its location,
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or for the lessee's business, the court said: "Laying out of view the question of fraud in the case, the plaintiff's obligation and duty rest wholly in the written contract. The words 'demise or let,' or their equivalent, in a lease, imply a covenant for title and for quiet enjoyment, but no other covenants on the part of the lessor are implied therein. *Foster v. Peyser* (1851) 9 Cush. 242, 57 Am. Dec. 43. There is no implied covenant in this lease that the stores were provided with drainage facilities suitable for their location, or that they were suitable for defendant's business for that or any other reason. The lessee is the party most deeply interested in protecting himself against casualties of storm and fire, and he should see to it that proper stipulations are embraced in the contract for his own security. And, as said in the case just cited (p. 247), 'if the parties really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning.'"

And in *Dutton v. Gerrish* (1851) 9 Cush. 89, 55 Am. Dec. 45, where the defendant let a warehouse to the plaintiff, it was held that there was no implied warranty that the warehouse was strong, suitably constructed, or fit for any kind of business whatever. The court said: "There was no implied warranty in this memorandum. . . . It is not described as hired or intended for any specific purpose, or for any particular kind or branch of business; and, though it was known that the plaintiffs were dealers in dry goods, and would probably use the warehouse in that business, yet that is not expressed in the written agreement; and it would have been quite within the right of the lessees to use the estate for any other branch of business, or for a manufactory or dwelling house."

And in *Russell v. Clark* (1912) 173 Ill. App. 461, where a basement was leased for a barber's shop and the lessee sometime after entering into possession moved, because of dampness caused by percolating water, it was held that there was no implied covenant on the part of the landlord that the premises at the time of letting were in tenantable condition, or that the physical condition should remain unchanged during the term.

And in *Lowe v. Payne* (1922) — Neb. —, 186 N. W. 320, where a building was leased by an automobile dealer, and he was subsequently ordered to vacate by the municipal authorities on account of the unsafe condition of the building, it was held that, in the absence of a warranty, deceit, or fraud on the part of the landlord, the rule of caveat emptor applies to leases of real estate, the control of which passes to the tenant, and that it is the latter's duty to make an examination of the devised premises to determine their safety and adaptability for the purposes for which they are hired.

A recital in a lease of a loft, that it is to be used and occupied for "the printing business," cannot be construed to be an implied

warranty that the loft is suitable and fit for the establishment of twelve printing presses running at a high rate of speed. *Scheffler Press v. Perlman* (1902) 130 App. Div. 576, 115 N. Y. Supp. 40.

In *Taylor v. Finnigan* (1906) 189 Mass. 568, 2 L.R.A.(N.S.) 973, 76 N. E. 203, where the defendant leased a story of a theater building, with a right of ingress and egress from the rear of the building, it was held that there was no implied warranty that the building was fitted for occupation as a theater, or for any particular use, and the tenant, who used the premises for a theater, was held not constructively evicted by a requirement of public officials that additional exits should be provided with which he could not comply, by reason of which his license was revoked.

And in *Barnett v. Clark* (1916) 225 Mass. 185, 114 N. E. 317, where a lease referred to the premises as "the garage," and contained a covenant against subletting except to a certain company "for garage purposes," it was held that this restrictive covenant did not cut down the right, created by the words "lease and demise," to use the premises for any lawful purpose, and that the descriptive words "the garage" did not raise an implied warranty that the premises were when leased, or would continue to be, fit or usable for a garage or any other purpose.

In *Kutchera v. Graft* (1921) 191 Iowa, 1200. — A.L.R. —, 184 N. W. 297, where one who leased a farm sought to recover from the lessor for the death of his hogs from cholera, on the theory that the lessor fraudulently concealed the fact that a former tenant's hogs had died from that disease, the court stated that it is a general rule that a lessor, in the absence of fraud, is not liable to the lessee for the condition of the premises, and that there is no undertaking that the premises may be safely used for the purposes for which they are intended.

And it is stated in a memorandum opinion in *Kerr v. Merrill* (1877) 4 Mo. App. 591, that there is no implied warranty on a demise of premises that they shall be fit for the particular purpose for which they are hired. It does not appear, however, what the nature of the property there leased was.

In *Rooserelt v. Abbott* (1864) 2 Robt. 156, where premises were leased for a boarding house, it was not decided whether there was an implied covenant that it was suitable for that purpose, but it was held that, conceding that such a covenant might be implied, it could not be extended by implication to cover "first-class" or any particular description of boarding houses not expressly designated in the lease.

In *Ducker v. Del Genovese* (1904) 93 App. Div. 575, 87 N. Y. Supp. 889, where two leased factory buildings had collapsed, the court, in construing the lessee's covenant to repair, said that while

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it was true that there was no implied warranty that the premises were fit for factory purposes the language of the contract was to be construed as contemplating buildings which under ordinary circumstances would continue in existence during the demised term.

In *Young v. Collett* (1886) 63 Mich. 331, 29 N. W. 850. the letting of a part of a building to a secret society "for lodge purposes," was held to imply a warranty that it was suitable; and the lessee was held not liable for rent upon its appearing that the floors were not sufficiently deadened to prevent the communication of sound. The court said: "When a landlord rents a building, and in the lease, as in this case, limits its use to a certain specified purpose, and the tenant agrees to do no more than keep the same in as good repair as when taken, it is evident that the landlord recommends the building as suitable for that purpose in the condition it then is, if there are no modifying clauses to the contrary contained in the lease; and it should be so held; otherwise there would be no consideration for the tenant's agreement to pay rent."

III. Leases of buildings under construction.

The rule that there is no implied warranty of fitness of premises leased for business purposes has been applied in some cases involving buildings under construction when the lease was executed.

Thus in *Rutland Foundry & Mach. Shop Co. v. King* (1876) 51 Vt. 462, where the lessor agreed to complete a building as soon as possible, but nothing was said in the lease as to the manner of completion, or the purpose for which it was to be used, it was held that the lessor was not liable for damages, although the referee found that the building was not constructed in a suitable manner to meet the purpose for which it was intended to be used, there being no covenant to complete with reference to use for such purpose, and the court apparently assuming that there was no implied warranty of fitness for such use.

And in *Robinson v. Wilson* (1918) 102 Wash. 528, 173 Pac. 331. where a lease to a hotel company provided for the completion of a building according to plans and specifications, it was held that the lessee could not recover, because of the inadequacy of the heating plant and seepage of water through the wall, if the building was built according to the plans and specifications, and the court held that there was no implied warranty as to the fitness of the building for the purposes for which it was leased, saying: "We think it will not be questioned that a landlord is not a guarantor of the fitness of a building for the purpose for which it is leased, unless he binds himself by written contract. Nor will the fact that he knows the use to which it is to be put hold him to such liability, where, as in this

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case, no restrictions are put upon the use of the building in the written lease. 'It is agreed by the authorities at the present time that, as a general rule, there is no obligation on the part of the lessor to see that the premises are, at the time of the demise, in a condition of fitness for use for the purpose for which the lessee may propose to use them. A lessee, like the purchaser of a thing already in existence, is presumed to take only after examination. The maxim *caveat emptor* applies; and, if he desires to protect himself in this regard, he must exact of the lessor an express stipulation as to the condition of the premises.' Tiffany, Land. & T. ¶ 86. 'As the landlord is under no obligation to the lessee, as regards the condition of the premises or its fitness for the lessee's purpose, at the time of the demise, so he is under no obligation to the lessee, or to the latter's assignee, to keep the premises during the tenancy in a condition satisfactory to the latter. Accordingly, a landlord is not bound, as a general rule, in the absence of special stipulation, to make repairs or improvements on the premises in order to render them safe or fit them for the tenant's use. And as a result of this principle, the tenant cannot assert any claim against the landlord on account of injury to himself or his property, owing to defects in the premises arising since the demise. . . . Even though the premises are leased for a particular purpose, and any other use thereof is prohibited, the landlord is, it has been decided, under no obligation to keep them fit for such use.' Id. ¶ 87. See also Taylor, Land. & T. §§ 327 *et seq.*; 24 Cyc. 1081. And this rule is not for the benefit of the one or the other, but is the corollary of the rule that, where there is a written contract of lease, general in its terms, a tenant cannot be bound by an oral declaration or general understanding that it was to be used for a particular purpose. 16 R. C. L. 729."

But in *Hunter v. Porter* (1904) 10 Idaho, 72, 77 Pac. 434, where a lease was made of a building under construction, describing the premises as "the cold storage building now in course of construction," and there was an agreement by the lessee that he would use the cold storage building only for the purpose of handling fruit and produce, it was held that there was an implied warranty that the building when completed should be such a structure as would be suitable for the storage and preservation of fruits at all times of year. The court said: "It is clear to us from an examination of the instrument itself that the lessor knew and understood the purpose for which the lessee was securing the premises; and not only that, but by the terms of his lease he restricted and confined the lessee to the use of the premises for those purposes only. At the time this agreement of lease was entered into the building was not completed, and was therefore not in a condition that the tenant could enter and examine the same to ascertain whether it met all the requirements for which he

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was leasing it. On the other hand, the landlord by the implied terms of the lease represented the building as a 'cold storage building,' and that term must be understood to have a meaning peculiar to a class or kind of building designed for the preservation and safe-keeping of such articles and products as it was understood that the tenant meant to keep in the building."

And in *La Farge v. Mansfield* (1859) 31 Barb. 345, where there was a lease of a single store in a large building in the course of construction, it was held that there was an implied covenant that the store should be finished and fit for use as a store by the time stipulated for the commencement of the term.

In *Gibbons v. Hoefeld* (1921) 299 Ill. 455, 132 N. E. 425, where a building in the course of construction was leased for store purposes, it was held that the lessor was bound to make the basement walls water-tight, so that the premises would be in a tenantable condition for the lessee's business.

In *Tarrabain v. Ferring* (1917) 12 Alberta L. R. 47, 35 D. L. R. 632, it was recognized that there is no implied covenant by a lessor of an existing building, that it is fit for the purpose for which it was known to be used; but it was held that the lessor's agreement to erect a building for the lessee for business purposes bound him to make the building suitable for the purposes for which the lessee required it, by furnishing an adequate heating apparatus to properly heat the premises.

IV. Leases of property containing mines or wells.

A mining lease does not of itself import any guaranty that the working of the mine will be profitable to the lessee. *Jefferys v. Fairs* (1876) L. R. 4 Ch. Div. 448, 46 L. J. Ch. N. S. 113, 36 L. T. N. S. 10, 25 Week. Rep. 227, 13 Mor. Min. Rep. 367; *Gowan v. Christie* (1873) L. R. 2 H. L. Sc. App. Cas. 273, 8 Mor. Min. Rep. 688.

And where a lease was made of land, giving the right to mine coal, it was held that there was no implied warranty that the premises were fit for the purpose for which it was demised, or that there was coal in the supposed veins. *Harlan v. Lehigh Coal & Nav. Co.* (1860) 35 Pa. 287, 8 Mor. Min. Rep. 496.

And it has been held that there is no implied covenant in a lease of a salt well that the well shall be of any particular productive capacity, and that, in the absence of an express agreement, the lessee takes it as he finds it. *Clark v. Babcock* (1871) 23 Mich. 164, 8 Mor. Min. Rep. 599.

So, where there was a lease of salt furnace property, "together with all the appurtenances thereto belonging, including six salt
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wells, tools and fixtures of the same, it was held that there was no implied covenant that there were six salt wells on the premises of any particular productive capacity, or suitable for the purpose for which they were leased. *Clifton v. Montague* (1895) 40 W. Va. 207, 33 L.R.A. 449, 52 Am. St. Rep. 872, 21 S. E. 858.

A lessee who has agreed to work a mine during the continuance of the lease is not, so long as the mine is not exhausted, exonerated from continuing to work the mine by the fact that its working has become unprofitable. *Walker v. Tucker* (1873) 70 Ill. 527, 8 Mor. Min. Rep. 672; *Beatie v. Rocky Branch Coal Co.* (1894) 56 Mo. App. 221; *Charlesworth v. Watson* [1906] A. C. 14, 75 L. J. K. B. N. S. 137, 94 L. T. N. S. 6; *Wigan Coal & I. Co. v. Eckersley* (1910) 103 L. T. N. S. 468; *Smith v. Morris* (1788) 2 Bro. Ch. 311, 29 Eng. Reprint, 171, 8 Mor. Min. Rep. 317; *Phillips v. Jones* (1839) 9 Sims. 519, 59 Eng. Reprint, 458, 3 Jur. 242, 8 Mor. Min. Rep. 344.

But in *Colorado Fuel & Iron Co. v. Pryor* (1898) 25 Colo. 540, 57 Pac. 51, 19 Mor. Min. 544, it seems to have been held to be an implied condition of a lease of undeveloped coal lands, on a royalty basis, that the coal should be produced at a profit to the lessee. The court said: "In construing a contract, the first point to ascertain is what the parties meant, understood, and intended as determined from the words employed . . . and as an aid in this respect, the situation of the parties, and the facts and circumstances surrounding the transaction at the time of the execution of the contract, as, also, its subject-matter and the object of the parties in making it may be taken into consideration. . . . The premises were demised expressly for coal-mining purposes. They were not then nor are they yet in shape to produce. Whether they could be successfully operated as a coal mine depended upon future development. By the transaction the lessor expected to receive compensation in the way of royalty, and the lessee profits from the operation of the leased premises as a coal mine; so that the benefits thus realized would be mutual. Unless coal was found of a merchantable grade which could be produced at a reasonable profit, or if that discovered was valueless, to require the lessee to mine it, and to pay royalty on the production would impose a burden without any benefits in return. The obligation was imposed upon the lessee to open the premises as a coal mine, and operate them as such, but in the absence of express provisions in the lease regarding what conditions should exist before a penalty would attach for a failure to observe this obligation, or under what circumstances it should comply with this provision, the law presumes that the parties to the lease, at the time of its execution, considered the purpose for which it was executed and the conditions under which it would be mutually beneficial to carry out its terms and provisions,

and, therefore, intended by the language employed to contract accordingly. 2 Parsons, Contr. 499. The right to mine having been granted, the law implied that the lessee should exercise reasonable diligence in working the mine, *Koch's Appeal* (1880) 93 Pa. 434, 4 Mor. Min. Rep. 151; but unless coal actually existed on the premises of a merchantable grade, which could be produced at a reasonable profit, or, if none existed, or that which was found was valueless, then, under this contract of lease, it would be under no such obligation. The court found that the degree of diligence required of the lessee to put the premises in working order had not been exercised; that a vein of merchantable coal existed on these lands, and that by the exercise of reasonable diligence, a certain tonnage could have been produced, but that was not sufficient upon which to base a judgment for substantial damages. The coal might be merchantable, and yet the lessee be unable to produce it at that profit, after deducting the stipulated royalty, which would be regarded as fair and reasonable for ventures of this kind, as determined from all the facts bearing on this subject. There was no attempt to prove that the coal could be mined, or the leased premises operated at such a profit, or if there was, the testimony which in any manner related to the subject was legally insufficient to establish this fact, and without it being established, there was not sufficient from which to deduce the conclusion that the lessee was under any obligation to mine the leased premises."

This case, however, is not necessarily at variance with the doctrine of the foregoing cases. In leases of undeveloped mineral property it is reasonable to suppose that it is an implied term of the lease that the property shall prove to be rich enough in mineral to be worked at a profit. The basis of this supposition does not exist where the lease is of an existing mine.

V. Leases of property with fixtures and equipment.

It will be observed that in the reported case (*DAVEY v. CHRISTOFF*, *ante*, 636) where the property demised was not realty only, but included a moving picture theater, seats, and all necessary equipment for the operation of the theater, the demise was held to resemble that of a furnished house, and therefore to fall within the exception raising an implied warranty of fitness in case of furnished houses; and there was held to be an implied warranty that it was fit for occupation, and a breach of the warranty where the heating apparatus was inadequate so that the building could not be used as a theater.

In *Jones v. Rouse* (1889) 11 Ky. L. Rep. 310, where a landlord undertook to furnish houseroom and sticks for tobacco crop, he was
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held bound by the agreement to furnish a house reasonably well adapted to the purpose for which it was to be used.

In *Naumberg v. Young* (1882) 44 N. J. L. 331, 43 Am. Rep. 380, where factory buildings containing an engine and boiler were leased for a button factory, there was held to be no implied warranty as to the condition or capacity of the engine and boiler.

In *Havens v. Brown* (1922) 208 Mo. App. 473, 237 S. W. 126, where a hotel and rooming house, consisting of thirty-seven rooms each of which had a steam radiator in it which led to a steam-generating plant located in the basement of another portion of the building, had been leased "in the present condition thereof," and the evidence showed that for many years the hotel had been heated from the plant located in the other portion of the building, and that there was no other method of heating it, it was held that there was an implied covenant to supply the heat necessary to keep the hotel warm, from the plant referred to.

VI. Effect of statutes.

The common-law rule denying the existence of an implied warranty of fitness was applied in *Landt v. Schneider* (1904) 31 Mont. 16, 77 Pac. 307, where premises were rented for a brewery, and a statute providing that where a building leased is intended for the use and occupation of human beings the lessor must put it in fit condition for such occupation, was held to be confined to property used for dwelling-house purposes, and not applicable to business property.

And in *Tucker v. Bennett* (1905) 15 Okla. 187, 81 Pac. 423, where premises were leased for the purpose of printing and publishing, and the building was unsafe for machinery, a statute providing that where a building is intended for the occupation of human beings the lessor shall put it in condition fit for occupation was held inapplicable, and the landlord not bound to put the building in a condition fit for occupation.

In *Bennett v. Southern Scrap Material Co.* (1908) 121 La. 203, 46 So. 211, where a building let for storage purposes collapsed, it was held that under the Civil Code the lessor warranted against all vices and defects which might prevent its being used for the purposes of the lessee.

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[ONTARIO APPELLATE DIVISION.]

MARTIN v. PROTECTIVE ASSOCIATION OF CANADA.

36 Ont. L. Rep. 19.

Insurance against accident — Voluntary or negligent exposure of unnecessary danger — Jumping from moving train.

There was a voluntary exposure to unnecessary danger within the meaning of a provision of an accident policy excluding liability in such cases, where the insured deliberately took passage on a train which he knew did not stop at the station for which he held a ticket and to which he wished to go, relying upon being able to alight at a near-by point at which trains usually stopped, and, upon finding that the train upon which he was traveling was not going to stop, jumped while it was traveling at from 8 to 12 miles an hour, and was injured.

(February 18, 1916.)

[20] APPEAL by the defendants from the judgment of the County Court of the County of Carleton, in favor of the plaintiff, for the recovery of \$650 upon a policy of accident insurance, for the loss of a hand, which was caused by the plaintiff falling when jumping from a moving train.

The appeal was heard by Meredith, C.J.C.P., Riddell, Lennox, and Masten, J.J.

A. H. Armstrong, for the appellants, argued that the injury to the plaintiff was the consequence of voluntary and negligent exposure to unnecessary danger, and consequently the plaintiff was disentitled to compensation both under the terms of the contract and under the provisions of the Ontario Insurance Act, R. S. O. 1914, chap. 183, § 172¹. He cited, in support of his contention, *Neill v. Travelers' Insurance Co.* (1885) 12 Can. S. C.

¹ The provision referred to is as follows: "In every contract of insurance against accident or casualty or disability, total or partial, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger; and no term, condition, stipulation, warranty, or proviso of the contract varying the obligation or liability of the assurer shall as against the assured have any force or validity."

55; *Smith v. Preferred Mutual Acci. Association* (1895) 104 Mich. 634, 62 N. W. 990; *Shevlin v. American Mutual Accident Association* (1896) 94 Wis. 180, 36 L.R.A. 52, 68 N. W. 866; *Small v. Travelers Protective Association* (1903) 118 Ga. 900, 63 L.R.A. 510, 45 S. E. 706; *Cornish v. Accident Insurance Co.* (1889) 23 Q. B. Div. 453, 58 L. J. Q. B. N. S. 591, 38 Week. Rep. 139, 54 J. P. 262; *Cook v. Grand Trunk R. W. Co.* (1914) 31 Ont. L. Rep. 183, 19 D. L. R. 600; *Turgeon v. The King* (1915) 51 Can. S. C. 588, 25 D. L. R. 475.

H. S. White, for the plaintiff, respondent, contended that the judgment in appeal was based on a finding of fact, and that the learned trial judge's finding should not be interfered with. The question was, What should a reasonable man do under the circumstances? There was evidence that the conductor had told the plaintiff to jump. The plaintiff's act did not amount to voluntary and negligent exposure to unnecessary danger. *McDougall v. Grand Trunk R. W. Co.* (1912) 27 Ont. L. Rep. 369, 4 Ont. W. N. 363, 8 D. L. R. 271; *Porter's Laws of Insurance*, 4th ed. pp. 503, 504. The conductor should not [21] have accepted the plaintiff's railway ticket if he had not intended to deposit him safely at Kemptville.

Armstrong, in reply.

Meredith, C.J.C.P.: In this action the plaintiff is seeking compensation from an insurance company, under his contract of insurance with them, for the loss of his left hand, as a result of getting off a railway train in motion. The contract provides for the payment of \$650 for the loss of a hand; and also that the insured shall at all times exercise due care and diligence for his personal safety and protection; but it is admitted that the laws of this province, relating to the conditions of a contract of this character, are applicable to this contract; and that the law, upon the one question now in issue between the parties, the question whether the plaintiff is disentitled to the compensation by reason of his want of such care, is, as applicable to the circumstances of this case, that, so to disentitle the plaintiff, his injury must have been "the indirect result of his intentional act," such

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act "amounting to voluntary or negligent exposure to unnecessary danger."

That the injury was the indirect result of his intentional act is undeniable; his intention, carried into effect, was to get off the moving train; it could make no difference if the conductor of the train or anyone else advised him to do so, and if he would not but for such advice; it was equally his intentional act; but, if such advice could aid his claim in this respect, it is not proved that it was ever given; the conductor denies it, and, to the contrary, asserts positively that he warned the man not to get off, a thing much more likely under the circumstances; and a brakesman of the train also testified that he too warned the man against getting off. The indirect result in question was that, when the man was thrown down on the ground, his left hand went under a wheel of the car. His statement that something struck him, as he was rising from his fall, and sent him down again with his hand on the rail, is not proved; it is very unlikely that he would know just what happened, and still more unlikely that anything was protruding from the train beyond the steps that could give such a blow—it must have been, if anything, some part of the train; but, whether or not, just the same, it would be an indirect result of his attempt to alight from the train in motion.

[22] Then, was it a voluntary exposure to unnecessary danger? What else could it be? A desire to get to his home as soon as possible, just because he desired to be there, can hardly be the opposite of voluntary,—compulsory. It was his voluntary act in going upon a through train, which he knew did not stop at his home station, a thing which, as a commercial traveler, he must have known it was not his right to do; he voluntarily took the chance of getting the indulgence of the conductor of the train in permitting him to travel on a train which never stopped at the man's home station, taking his chances of getting off some little distance from that station where trains usually stopped, and, it is said, ought always to stop, before crossing the track of another line of a railway, but never to stop there for letting down or taking up passengers. That it was a danger, a great danger even to agile trainmen, is self-evident.

So, too, it was a negligent exposure to unnecessary danger,
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great danger, as I have said. The man, in his application for this insurance, made in May, 1913, stated that he was then forty-seven years of age, weighed 200 pounds, and was 5 feet and 8 inches in height; he had been under medical treatment at one time for indigestion, which, his physician thought, was caused by his obesity, which he also thought might be affecting his heart. On the 11th February, in the neighborhood of Smith's Falls, about 5 o'clock in the afternoon, with the temperature 32° below zero, and with ice and snow upon the ground, this man, dressed in a winter overcoat, and carrying a traveling bag in his right hand, stepped off a through train, the speed of which he says he did not know, but which the conductor of the train testified was from 8 to 12 miles an hour, a mile or so before coming to the place where it usually stopped, and we are seriously asked to find that that was not a negligent exposure to unnecessary danger. It hardly needed the testimony of the train conductor, of twenty-two years' railroad experience, that it was so much so that he would not have attempted it; but there is that testimony, and that is all there is on that subject. See *Cornish v. Accident Insurance Co.* (1889) L. R. 23 Q. B. Div. 453, 58 L. J. Q. B. N. S. 591, 38 Week. Rep. 139, 54 J. P. 262; and *Garcelon v. Commercial Travellers' Eastern Accident Association* (1907) 195 Mass. 531, 10 L.R.A.(N.S.) 961, 81 N. E. 201.

If the man's life, or a great fortune, depended upon it, one might not blame him for taking the risk; but, even in such a [23] case, how could the risk be, justly, put upon the insurance company? No part of the fortune would in any case have come to them.

Being a commercial traveler, the plaintiff must have known that he would not have been carried very far without payment of the fare, and he had paid to Kemptville only; and he probably knew the law that he could not be put off except at some safe place; the result of all of which is that he would probably have been let down at Kemptville, or at the worst the next station.

But all that is not very material; nor was a good deal of the evidence which would have been material if the action had been against the railway company. The plaintiff was a man of mature years, entirely his own master, and under no compulsion, except

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his desire to get home by that train; and it is but proper to add that where passengers will not wait for, or for other reasons will not take, the regular and proper trains, stopping for passengers to alight and board, at their destinations, they ought to remember that they are acting in breach of their contracts and of the rights and interests of the railway company, and are taking risks. So, too, when entering into an insurance contract, the insured should make sure of the nature of the insurance effected, and not carry away a policy not covering his negligent acts, of all kinds, if he expects after an accident to be treated as if it did.

The learned county court judge seems to have treated the *obiter dicta* of a learned judge of a court, the shadow of which is much nearer to him than that of this court, and not the words of the enactment in question, as the law governing the case; so that we are really not reversing his finding of fact; if the case had been dealt with by him upon the very words of the act, I have the hope and belief that our findings are quite in accord with that which his would have been.

I would allow the appeal.

Of sympathy for the plaintiff it ought to be needless to speak; it does the man no substantial good, and must be known, unexpressed as well as expressed, for, in human nature, how could it be but abundant?

Riddell, J.: This appeal from the County Court of the County of Carleton involves an interpretation (1) of the terms [24] of a contract of accident insurance and (2) of the statutory provision, R. S. O. 1914, chap. 183, § 172 (1).

The plaintiff, a commercial traveler, procured a policy of accident insurance from the defendants, providing (amongst other things) for the payment to him of \$650 if he should from external, violent, accidental causes lose a hand at or above the wrist: "the insured shall at all times exercise due care and diligence for his personal safety and protection."

Being a commercial traveler, using trains every day, he on the 11th February, 1915, was at Smith's Falls, where he had stayed overnight,—he had a commercial ticket from Brockville to Kemptville, and desired to go to the place last named. Accord-
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ingly, he boarded at Smith's Falls a Canadian Pacific Railway train which passed through Kemptville on the way to Montreal. It is sworn, and not contradicted, that on the train he was asked if he had not heard the brakeman announce that the train did not stop for passengers between Smith's Falls and Montreal, and said "Yes." He admits that he knew that it was a through train, which did not stop with passengers at Kemptville, "only that they usually stopped there . . . at what is known as the 'Diamond,' " about $1\frac{1}{2}$ or 2 miles from Kemptville. The conductor took up the ticket—and, later on, upon being asked whether he was going to stop at the 'Diamond,' answered in the negative. The plaintiff who is described as a stout, obese man, took his "grip" and stepped down on the steps of the car and stepped or jumped off. The speed of the train at the time does not seem to be definitely fixed—the conductor says 8 to 12 miles an hour. No one says any less; the plaintiff does not know. The place was not the place where the train usually stopped, but some distance away—the plaintiff says the conductor said to him as he stepped out of the door, "You had better jump"—this the conductor denies, and says that he told the plaintiff not to jump.

The plaintiff fell, and in some way his arm got under the wheels, and he lost his hand above the wrist.

The county court judge held that he had not disentitled himself to relief and gave him judgment against the insurance company—the company appeal.

The learned county court judge is apparently impressed by a definition of "voluntary" in this connection given by Sedgewick, J., in *Canadian Railway Accident Insurance Co. v. McVerin*. (1902) [25] 32 Can. S. C. 194—that to be a voluntary exposure to unnecessary danger the act must, according to the view of a reasonable man, be madness, except on the hypothesis of voluntary suicide or self-mutilation.

This definition—or description—is *obiter*, not necessary for the decision, and is not concurred in by other judges. It does not seem to me that "voluntary" has any such extreme connotation; but, in any case, the words of the statute are "voluntary or negligent," and there may be, and often, hourly, is, negligence without anything that looks like suicide or self-mutilation.

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The question here is—Was this unfortunate accident the result of (1) an intentional act (2) not amounting to voluntary or negligent exposure (3) to unnecessary danger?

That the act was intentional is undoubted—Was it a negligent exposure to unnecessary danger? This is a question of fact within reasonably wide limits.

The danger was obvious, the plaintiff knew it well—it seems to me to have been unnecessarily incurred. No reason is given why it could be necessary for the plaintiff to get off as and when he did—he lived at Kemptville indeed, but no great exigency called for him to risk life or limb; the only reason he gives is that he had been accustomed to get off at the Diamond when the train stopped (as it usually did)—and that this day the train was not going to stop. That the conductor told him to jump (if he did) adds nothing to the necessity.

I do not press the point that the conductor, having taken up the ticket reading only to Kemptville, would probably not take the chance of carrying him to Montreal, but would almost certainly put him off at or near Kemptville.

Then was the exposure negligent? I accept the criterion of the county court judge—Was it something “which reasonable and ordinary prudence would pronounce dangerous? And, on the evidence, I think that this was negligent, something which reasonable and ordinary prudence would pronounce dangerous—the insured did not exercise due care and diligence, as required by the terms of the policy, and the statute does not help him.

As this is a question of fact, not much assistance, except in a general way, can be derived from the cases. The following contain statements of more or less importance in cases not dissimilar: [26] *Neill v. Travelers' Insurance Co.* (1885) 12 Can. S. C. 55; *Canadian Railway Accident Insurance Co. v. McNevin* (1902) 32 Can. S. C. 194; *Cornish v. Accident Insurance Co.* (1889) L. R. 23 Q. B. Div. 453, 58 L. J. Q. B. N. S. 591, 38 Week. Rep. 139, 54 J. P. 262; *Cook v. Grand Trunk R. W. Co.* (1914) 31 Ont. L. Rep. 183, 19 D. L. R. 600; *Lovell v. Accident Insurance Co.* (1874) 3 Ins. L. J. 877; Cyc. vol. 1, p. 259; Am. & Eng. Encyc. of Law, 2d ed. “Accident Insurance,” vol. 1, pp. 284 et seq.

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The appeal should be allowed, with costs, and the action dismissed, with costs.

Lennox, J., agreed with the opinion of the Chief Justice.

Masten, J., agreed in the result.

Appeal allowed.

Note.—**Accident insurance: alighting from or boarding moving train as voluntary exposure to unnecessary danger, or obvious risk of injury, within exception of policy.**

It may be stated that the question whether an insured has been guilty of a voluntary exposure to unnecessary danger or obvious risk of injury within the meaning of an exception in an accident policy, in boarding or alighting from a moving train, depends upon the particular facts and circumstances of each case.

It has been held that it is not obviously dangerous as a matter of law to step from a car moving at any speed whatever, and that therefore a demurrer to a plea merely alleging that there was an exposure by the insured to obvious risk of injury or known danger, within an exception of an accident policy, in stepping, jumping, or alighting from a moving car, should be sustained. *National Life & Acci. Ins. Co. v. Lokey* (1910) 166 Ala. 174, 52 So. 45.

And it has been held that attempting to board the front platform of an electric car while it was moving at a very slow rate of speed did not, as a matter of law, amount to a "voluntary or unnecessary exposure to danger, or to obvious risk of injury." *Johanns v. National Acci. Soc.* (1897) 16 App. Div. 104, 45 N. Y. Supp. 117, 2 Am. Neg. Rep. 767.

And it has been held that an attempt to board a train pulling out of a station at a speed of about 2 miles an hour is not, as a matter of law, an unnecessary exposure to danger. *Travelers Preferred Acci. Asso. v. Stone* (1893) 50 Ill. App. 222.

And whether a railroad employee, accustomed to board trains in motion, is guilty "of voluntary exposure to unnecessary danger" in attempting to board a train running at from 4 to 6 miles per hour, has been held a question for the jury. *Colten v. Fidelity & C. Co.* (1890) 41 Fed. 506.

And in *Badenfeld v. Massachusetts Mut. Acci. Asso.* (1891) 154 Mass. 77, 13 L.R.A. 263, 27 N. E. 769, the court said that leaving a car while in motion was not necessarily "a voluntary exposure to unnecessary danger," but that whether it was or not depended upon
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the circumstances, which in that case did not appear, even if it could be inferred that the insured received the injury which caused his death while alighting from the moving car.

And whether a cattle dealer, who was permitted by the policy to attend his cattle during shipment, was guilty of a "voluntary exposure to unnecessary danger," was held in *Pacific Mut. L. Ins. Co. v. Snowden* (1893) 7 C. C. A. 264, 12 U. S. App. 704, 58 Fed. 342, to be a question for the jury, where, while he was attending the cattle, the engineer sounded the signal, "off brakes," and, realizing that he was so far from the caboose that, before he could get to it, the train would be under such headway that he could not get on, he started to climb upon the iron ladder attached to a car for the use of the train crew, stock men, and others having the right and occasion to use it, intending to climb to the top of the car and remain there until the next station was reached; but, just as he was in the act of reaching the top of the car, and was still holding on to the iron ladder, a "helping engine," at the rear of the train, pushed the cars with such suddenness and force as to break his hold upon the ladder and throw him down between the cars.

And in *Continental Casualty Co. v. Deeg* (1910) 59 Tex. Civ. App. 35, 125 S. W. 353, the question whether the insured's death resulted from a voluntary exposure to unnecessary danger or obvious risk of injury was held to have been properly left to the jury, where there was evidence that he was an active railroad man and was killed in alighting from a slowly moving train on which he was a passenger, and also evidence that he did not attempt to step off the train, but fell off. The court said: "The testimony above quoted, coming from the persons who appear to have been in a position to witness the event, if accepted by the jury, shows that Deeg from some accidental cause lost his balance before he could be said to have undertaken the act of getting off, and that this, an accident pure and simple, was what led to his death, and not any danger that lurked in the act of getting off the moving train, because such act had not been reached. And if it had been reached, and he had met his death as a result, it would not follow, as a matter of law, that he voluntarily exposed himself to such danger. In order for this to be, the danger must have been one so logically attending the act that he must have been conscious of it. A train may be going so slow that no one would imagine danger in getting off, and, on the other hand, it may be going so fast that everyone would realize the presence of danger in the act. The train was nearing the station, and was going at what seems to have been a low rate of speed. The deceased was an experienced railroad employee, in active service on and about trains, and whether or not to such a person there was danger at all in his getting off this train at that time and place, and the train going at
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that speed, would have been a question proper to submit to the jury; and, for better reason, the question whether or not he was conscious of the danger of what happened, for unless it was sufficiently probable to present itself to him he could not be said to have voluntarily exposed himself to it."

And a traveling salesman cannot be held, as a matter of law, to have voluntarily exposed himself to unnecessary danger in attempting to board a train just after it had started from the station, there being evidence that it had moved about 125 feet and was going at a speed of from 8 to 10 miles an hour, and it not appearing that he knew of the close proximity to the track of a building with which he came in contact as he was drawing himself up on the step of the car. *Fidelity & C. Co. v. Nittig* (1899) 181 Ill. 111, 48 L.R.A. 359, 54 N. E. 903. The court said: "The term 'voluntary exposure' does not mean simply that the act of attempting to get aboard of the moving train was voluntary or was consciously and intentionally performed, but also that the insured was conscious of the danger to which he was then exposing himself and voluntarily assumed it, or that the danger was so apparent that a man of ordinary intelligence would, under the circumstances, necessarily have known it. One may voluntarily do an act exposing himself to great danger, which danger he does not apprehend and which is not obvious. In such a case it could not be said that he voluntarily exposed himself to danger. If he does not know of the danger, how can it be said that he voluntarily assumes it or exposes himself to it? Mere failure to observe ordinary care would not, as in an action for negligence, defeat a recovery on the contract. This view of the law is not controverted by appellant. Indeed, the trial court, at appellant's request, instructed the jury that the words 'voluntary exposure,' as used in the policy, implied conscious, intentional exposure,—something which he was willing to take the risk of; that it meant a willing or wilful assumption of the risk, knowing the risk.—a wilful, conscious assumption of the risk of danger. As before said, there was no evidence whatever that he knew of the proximity of the ticket office building, or had any reason to believe that he was exposing himself to the danger of coming in contact with any such object before he could get within the car. His experience, strength, and activity may have been such, so far as the evidence shows, that there was less danger to him in mounting a car going at the speed mentioned by the witnesses than there would be to many persons in mounting a car at the moment of starting, and it would be an unreasonable rule to adopt, to hold, as a legal proposition, that a traveler who steps upon the platform or steps of a moving car of a railway train voluntarily exposes himself to unnecessary danger, though it may be conceded he is guilty of negligence in so doing. There are, doubtless, few trainmen whose

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duty it is to alight at station platforms who do not board the train after it has started. In doing so it certainly could not be said, as a matter of law, that they thus incur obvious danger. At what rate of speed, then, must the train be moving before it can be said that an attempt to get aboard would be obviously dangerous? All reasonable minds would agree that it would be obviously dangerous to attempt to climb upon a passing railway train going at full speed or at a high rate of speed, and in a proper case, doubtless, the jury would be so instructed; but it does not follow that it would be proper to so instruct the jury in a case where the train had not, after starting, proceeded beyond 100 or 125 feet, and had acquired only such speed as shown by the evidence in this case. The question in such a case is one of fact, and not of law, and in the case at bar the question of fact has been conclusively settled against the appellant."

And one attempting to board a train moving at a rate not so fast as one would walk from a station platform does not, as a matter of law, wilfully and wantonly expose himself, within a provision of a policy of accident insurance exempting the company from liability for any "injury happening to insured by reason of his wilfully and wantonly exposing himself to any unnecessary danger or peril." *Schneider v. Provident L. Ins. Co.* (1869) 24 Wis. 28, 1 Am. Rep. 157, 7 Am. Neg. Cas. 174. The court said: "The question, therefore, remains, whether the attempt of the deceased to get upon the train was within this provision, and constituted a 'wilful and wanton exposure of himself to unnecessary danger.' I cannot think so. The evidence showed that the train, having once been to the platform, had backed so that the cars stood at some little distance from it. While it was waiting there, the deceased was walking back and forth on the platform. It is very probable that he expected the train to stop there again before finally leaving. But it did not. It came along, and while moving at a slow rate, not so fast as a man would walk, he attempted to get on, and, by some means, fell either under or by the side of the cars, and was crushed to death. The act may have been imprudent. It may have been such negligence as would have prevented a recovery in an action based upon the negligence of the company, if there had been any. But it does not seem to have contained those elements which could be justly characterized as wilful or wanton. The deceased was in the regular prosecution of his business. He desired and expected to leave on that train. Finding that he would be left, unless he got on while it was in motion, it was natural enough for him to make the attempt. The strong disinclination which people have to being left would impel him to do so. The railroad employees were getting on at about the same time. Imprudent though it is, it is a common practice for others to get on and off in the same manner. He had undoubtedly seen it done, if he had

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not done it himself, many times, without injury. I cannot regard it, therefore, as a wilful and wanton exposure of himself to unnecessary danger, within the meaning of the policy."

This case was distinguished in *Shevlin v. American Mut. Acci. Asso.* (1896) 94 Wis. 180, 36 L.R.A. 52, 68 N. W. 866, where it was held that jumping, without any reasonable necessity therefor, in the dark, from a freight train in rapid motion, on which one was riding without permission, was an "exposure to unnecessary danger," within the meaning of an exception in an accident policy which did not contain the words "voluntarily," "wantonly," "wilfully," or any equivalent words. The court said: "It excepts 'any injury resulting in whole or in part from exposure to unnecessary danger.' The word 'voluntary' does not occur, which led to the construction that the negligence contemplated was a conscious exposure to danger, to gross negligence, in some of the cases referred to, not necessary here to approve. It does not contain the words 'wantonly and wilfully,' or any equivalent words, which led to the decision in *Schneider v. Provident L. Ins. Co. supra*. The language can hardly be said to admit of two constructions, so as to invoke the application of the rule that the construction should be adopted most favorable to the assured. It plainly includes all cases of exposure to unnecessary danger where such exposure is attributable to negligence on the part of the assured; that is, the exception was intended to hold the insured responsible for the exercise of ordinary care, and to except from the provisions of the policy all cases of injury occurring in whole or in part through a failure to exercise such care. Under such a provision no recovery can be had if the injury is caused by reason of exposure to unnecessary danger, within the general principles of the law of negligence. Under this construction of the policy, no other conclusion can be reached than that the assured came to his death by reason of his exposing himself to unnecessary danger; hence, there being no evidence to support the verdict, the trial judge erred in refusing to set it aside, and grant a new trial."

It will be observed that in the reported case (*MARTIN v. PROTECTIVE ASSO. OF CANADA, ante*, 660), where the insured, a traveling man, who was desirous of reaching home, boarded a train which he knew did not stop at his destination, with the expectation of being able to leave it at a point near by at which trains generally stopped, was held guilty of voluntary exposure to unnecessary danger within an exception in his accident policy in jumping from the train with his bag and coat, after he found that it was not going to stop as he expected, and when it was moving 8 or 12 miles an hour.

And it has been held that for a man sixty-six years old, weighing 184 pounds, and carrying an umbrella under his arm, to attempt to board a train running 6 or 8 miles an hour, is so obviously dangerous

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as to come within an exception in an accident policy that it does not extend to death or injury resulting from "voluntary exposure to unnecessary danger." *Rebman v. General Acci. Ins. Co.* (1907) 217 Pa. 518, 10 L.R.A. (N.S.) 957, 66 Atl. 859.

And a traveling salesman who, without any necessity shown, while carrying a bag in each hand, jumped from a train moving at the rate of from 1 to 6 miles an hour, just after it had pulled out of a station, was held as a matter of law, to have exposed himself to an "obvious risk of injury," within the meaning of a provision in a policy exempting the company from liability in case of an injury resulting from "voluntary or unnecessary exposure to danger, or to obvious risk of injury." *Smith v. Preferred Mut. Acci. Asso.* (1895) 104 Mich. 634, 62 N. W. 990.

It was held in *Travelers Protective Asso. v. Small* (1908) 115 Ga. 455, 41 S. E. 628, that the question whether an attempt to board a moving train of cars propelled by steam is a "voluntary or unnecessary exposure to danger, or to obvious risk of injury," "depends upon whether, under all the circumstances at the time the attempt was made, an ordinarily prudent person would have made the attempt; that if such a person would not have done so, and if there was no emergency which required the insured to board the train, except inconvenience of delay or possible injury to business,—the attempt falls within the provision.

And applying this doctrine, upon a subsequent appeal of the same case in (1903) 118 Ga. 900, 63 L.R.A. 510, 45 S. E. 706, it was held that an attempt to board a train running at 8 or 10 miles an hour, by a young, strong, and active man with experience as a "traveling" man in boarding and alighting from moving cars, was an exposure to "obvious risk of injury," within the meaning of the policy; and, when made merely for the purpose of avoiding the delay incident to missing the train, would, as a matter of law, prevent a recovery against the insurer for injuries received in consequence of such attempt. The court accordingly affirmed a judgment entered on a nonsuit against the plaintiff in an action to recover on the policy.

In *Biehl v. General Acci. Assur. Corp.* (1909) 38 Pa. Super. Ct. 110, where there was conflicting evidence as to whether the insured, who was a passenger on a crowded street car, fell or jumped from it, the trial court in submitting the question whether his death resulted from unnecessary exposure to obvious risk of injury, or obvious danger, charged that if he jumped from the car while it was in motion the verdict should be for the defendant, and that if the jury found that he tripped or fell from the car, and that his rising and walking on the platform and descending from the running board was such a risk as an ordinarily prudent man would take, there could be a recovery, but that there could not if it was such an obvious risk of

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danger that an ordinarily prudent man would not take it. In holding that the defendant had no ground of complaint the court, with reference to the provision under consideration, said: "Unnecessary exposure to obvious danger means an exposure with knowledge, or under circumstances from which knowledge would be inferred, to a risk which it was not necessary to incur. The meaning is the same as if the exception had been expressed in the words 'voluntary exposure to unnecessary danger,' which form of expression in contracts of this character has been frequently construed. The exception means a wanton or grossly imprudent exposure. It is not such exposure as men usually are going to take, such as is incident to the ordinary habits and customs of life. Such an exposure does not come within the range of a defense. An exposure, in order to have been a contributing cause, and so defeat the plaintiff's right to recover, must be something beyond the ordinary, or wanton piece of gross carelessness, as we would term such in our designation of conduct in the usual walks of life."

In *Alter v. Union Casualty & Surety Co.* (1904) 108 Mo. App. 169, 83 S. W. 276, it was held that a case of "voluntary exposure to avoidable danger" was conclusively established, and that the jury should have been so instructed, by the testimony of the insured that, instead of proceeding to his residence through the public streets, as he might have done, he took a more direct route through railroad yards, through which trains were momentarily passing, and, finding his way blocked by a moving freight train, climbed upon the train while in motion, and was knocked therefrom by the arm of a semaphore, notwithstanding that it had been his daily custom to take the dangerous path.

In *Garcelon v. Commercial Travellers' Eastern Acci. Asso.* (1907) 195 Mass. 531, 10 L.R.A.(N.S.) 961, 81 N. E. 201, where an accident policy provided that the insurer should not be liable for "any injury which the member, by the exercise of ordinary care, prudence, and foresight, might have averted or prevented, or to which the member's own negligence shall have contributed," the insured was held to have contributed to his injury by his own negligence, it appearing that he was a traveling man and had left a freight train on which he was a passenger at a stopping place, and attempted to board the train after it had started, by means of a ladder on the side of a freight car, and was thrown and injured by the jerking of the train.

J. T. W.

[ENGLISH COURT OF APPEAL.]

IN RE WAKLEY.

WAKLEY *v.* VACHELL.

[1920] 2 Ch. 205.

Will — Bequest of cumulative preference shares — Dividends declared after testator's death — Whether apportionable in respect of period before death.

A dividend declared after a testator's death upon cumulative preference shares upon which, at the time of his death, the dividends were in arrears, of an amount sufficient to cover unpaid dividends for years during which no dividend had been earned or paid, is to be regarded as a dividend as of the year in which it is declared, and hence is not apportionable between the legatee of the shares and the testator's estate under § 70 of the Apportionment Act 1870, which provides that all dividends and other periodical payments in the nature of income shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Statement of Buckley, J., in *In re Taylor's Trusts* [1905] 1 Ch. 734, 738, 74 L. J. Ch. N. S. 419, 53 Week. Rep. 441, 92 L. T. N. S. 558, followed by Astbury, J., in *In re Sale* [1913] 2 Ch. 697, and Eve, J., in *In re Grundy* (1917) 117 L. T. N. S. 470, approved.

Decision of Peterson, J., reversed.

(February 23, 1920.)

APPEAL from a decision of Peterson, J.

William John Wakley by his will dated October 16, 1903, after appointing his wife, Charlotte Alice Wakley, D. T. N. Wade, [206] and P. Miles executors and trustees thereof, and making various specific and pecuniary bequests, bequeathed all the shares held by him in a company called Morgan, Wakley, & Company, Ltd., to his trustees upon trust for sale and investment and to stand possessed of the investments in trust for his son Ronald, to be absolutely vested in him on the testator's death, but not to be payable or transferable to him until he attained the age of twenty-two years. The will then provided that the trustees should immediately after the testator's death procure themselves to be registered as the holders of the shares and stand possessed of the said shares and postpone the sale thereof until his son

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should attain the age of twenty-two years, and upon that event happening should transfer the said shares to him provided he should be then actively engaged in the business of the company. The trustees were also empowered to transfer the shares to Ronald before he attained twenty-two on the same conditions, and to accumulate during his minority any income of the shares to be applied towards his maintenance or education or otherwise for his benefit during his minority, and to add the accumulations thereof to the capital. The testator then devised and bequeathed the residue of his real and personal estate to his trustees upon trust to sell and convert and invest the proceeds, and to stand possessed of his residuary trust moneys upon trust after payment thereof of an annuity to his wife for his children in equal shares. The trustees were further empowered to apply in or towards the maintenance, education, or benefit of each child entitled to a share in the residuary trust funds not absolutely vested the whole or any part of the income, and to accumulate the unapplied surplus in augmentation of the capital. The testator then settled his son Ronald's share of residue upon trust for Ronald for life, with remainder to his children or issue, and in default of issue upon trust for the testator's other children in equal shares.

The testator died on November 7, 1905, leaving his widow and four children,—namely, Ronald, Dorothy, Marjorie, and Denis.

[207] Ronald attained the age of twenty-one in 1911, and thereupon became entitled to the absolute interest in the shares in Morgan, Wakley, & Company, Ltd., bequeathed to him by the will, which were accordingly transferred to him by the trustees. He died on April 9, 1918, having been married, but leaving no issue. By his will he appointed A. C. Vachell and R. Tomlinson his executors.

Questions having arisen as to the funds out of which the sums expended on the maintenance and education of Ronald during his minority ought to have been paid, the trustees of the testator's will on April 4, 1919, took out an originating summons for the determination by the court of the question (*inter alia*) whether upon the true construction of the will and in the events which had happened the sums expended for the maintenance,
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education, or benefit of Ronald during his minority ought to have been paid out of (a) the income arising from the shares in Morgan, Wakley, & Company, bequeathed by the will in trust for him; (b) the income arising from the share of the residuary estate settled upon trusts under which Ronald was entitled during his life; or (c) the income of either or both such funds at the discretion of the trustees in any other way, and if so in what proportions.

After the issue of the summons the accounts of the testator's estates were examined on behalf of Ronald's executors, and it then appeared that a sum paid as dividends on the shares in Morgan, Wakley, & Company, Ltd., in December, 1907, had been apportioned between the testator's estate and Ronald. Accordingly on October 19, 1919, Ronald's executors took out a summons asking for a declaration that the sum of 6,210*l.* 6*s.*, representing the dividends paid upon the preferred and deferred ordinary shares in Morgan, Wakley, & Company, Ltd., in December, 1907, was wholly income of the share of Ronald, and that no part of the same ought to be treated as capital of the estate of the testator, on the ground that the same was wholly earned after the death of the testator.

The facts with regard to these dividends were as follows:—

By clause 5 of the memorandum of association it was [208] provided that "the capital of the company is 75,000*l.* divided into 2,000 preferred ordinary shares, and 5,500 deferred ordinary shares of 10*l.* each. The profits or other moneys of the company available for dividend which it shall from time to time be determined to distribute are, subject to the rights of the holders of any shares which may hereafter be created and issued, to be applicable first to the payment of a fixed cumulative dividend at the rate of 6 per cent per annum on the capital paid up on the said preferred ordinary shares; secondly, to the payment of a fixed cumulative dividend at the rate of 12 per cent per annum on the capital paid up on the said deferred ordinary shares; thirdly, of the surplus one sixth shall be applicable to the payment of a further dividend on the said preferred ordinary shares ratably as aforesaid, and five sixths shall be applicable to the payment

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of a further dividend on the said deferred ordinary shares rat-ably as aforesaid."

The material articles were the following:—

Article 119: "The directors may, with the sanction of the company in general meeting, from time to time, declare a dividend to be paid to the members in accordance with their rights and interests in the profits and other moneys available for that purpose."

Article 120: "No dividend, instalment of dividend, or bonus shall be payable except out of the profits arising from the business of the company. No larger dividend shall be paid than shall be recommended by the directors."

Article 121: "The directors may, if they think fit, from time to time determine on, and declare an instalment to be paid to the members on account and in anticipation of the respective dividends for the current year."

Article 128: "No unpaid dividend, bonus, or interest shall bear interest as against the company."

The company made a profit for the half year ending December 31, 1904, of 1,600*l.*, but no dividend was declared. In the next year, ending December 31, 1905 (the year in which the testator died), there was a loss of over 14,000*l.* In the year ending December 31, 1906, there was a profit of 16,617*l.*; [209] for the first half year of 1907 there was a profit of over 20,000*l.*, and apparently a still larger profit for the latter half of the year. The shares being cumulative preference shares, the result of the large profits was that there was paid in 1907 a dividend sufficient to cover not only the dividend for that year, but also the dividends which had not been paid in the two previous years.

On December 2, 1907, the directors resolved to declare, and forthwith pay, an interim dividend at the rate of 18 per cent on the preferred, and 24 per cent on the deferred, shares, "which payment will cover the cumulative dividend on the preferred for three years ending June, 1907, and on the deferred for two years ending 1906."

On February 4, 1908, it was resolved by the company in general meeting "to distribute a further dividend of 3 per cent on the preferred ordinary, and 18 per cent on the deferred ordinary,
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shares, which would wipe off all arrears of the cumulative dividends on both classes of shares up to the 31st December, 1907."

The payment of the interim dividend was accompanied by a letter of the secretary to the company dated December 3, 1907, in the following terms: "I have much pleasure to inform you that your directors have decided to distribute an interim dividend at the rate of 18 per cent on the preferred ordinary shares (being 6 per cent per annum for three years ending June, 1907), and 24 per cent on the deferred ordinary shares (being 12 per cent per annum for two years ending June, 1906), and I now beg to inclose cheque for the interim dividend due on your holdings," and then followed particulars of the cheque.

The two summonses were heard together by Peterson, J., on November 12 and 13, 1919. In answer to the question asked by the originating summons, his Lordship declared that the sums expended in the maintenance, education, and benefit of Ronald during his minority ought to have been paid out of the income arising from the shares in Morgan, Wakley, & Company, Ltd., except as to the first two years after the death of the testator, when such sums were in fact paid out [210] of his share of the residuary estate, and that such payment ought to be treated as an exercise of the trustees' discretion.

In answer to the second summons his Lordship held that the Apportionment Act 1870 applied, and that the sum therein mentioned ought to be apportioned between the respective estates of the testator and Ronald.

Ronald's executors appealed from the decision on both points. The appeal came on for hearing on February 4, 1920.

The question raised by the first summons depended on the construction of the provisions of the particular will, and does not call for a report, and the arguments and the parts of the judgments of the Court of Appeal dealing with it are therefore omitted. The present report is accordingly confined to the question as to the dividends raised by the second summons.

Hughes, K.C., and F. Whinney, for the appellants. The whole of the dividend belongs to the appellants as the executors of Roland, the specific legatee of the shares. The dividend was,
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it is submitted, a dividend of 18 per cent for the year 1907, when it was declared, and not a dividend of 6 per cent for each of the years 1905, 1906, and 1907. Where there is a provision for a cumulative preference dividend it does not mean that a preference shareholder is entitled to a dividend of the specified amount for every year. Of course if no profits are earned in a given year there can be no dividend, but when profits are available for dividend then the preference shareholder is entitled to say that the ordinary shareholder shall take nothing until the preference shareholder has received his average dividend for all the years during which the preference shares have been in existence. That is the extent of his rights. But when the dividend on the preference shares is declared it must go to the persons who at the time hold the shares. A dividend can only be declared for the year during which profits are available. It is not a question of wiping out arrears. Until profits are earned there are no arrears.

The mode in which the resolution declaring the dividend states it is to be applied cannot affect the question. The [211] division between the preference and ordinary shareholders is determined by the memorandum and articles of association. See articles 119-121.

The testator's estate is not entitled under the Apportionment Act 1870 to any portion of the dividend declared in 1907. The principle of *In re Taylor's Trusts* [1905] 1 Ch. 734, 74 L. J. Ch. N. S. 419, 53 Week. Rep. 441, 92 L. T. N. S. 558, applies *a fortiori* to the present case. Under the instrument in that case Buckley, J., held that there was no interest payable at all as income of a year in which there was no fund available for its payment. That case was followed in *In re Sale* [1913] 2 Ch. 697. *In re Armitage* [1893] 3 Ch. 337, 63 L. J. Ch. N. S. 110, 7 Reports, 290, 69 L. T. N. S. 619, which was also there followed, is not so much in point.

It cannot be right to say that a dividend is declared in respect of a year in which there were no profits or even a loss. If our contention is wrong then a specific legatee of preference shares might be bound, years after the receipt of his legacy, to account for an apportioned part of a sum representing arrears of dividends.

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Here there has been no declaration of dividend in respect of any year other than the current year. "Dividends," as defined in the Apportionment Act, must be used with reference to current dividends.

Romer, K.C., and H. S. Preston, for the respondents. The Apportionment Act 1870 applies. The effect of clause 5 of the memorandum of association is to give the preference shareholder a cumulative dividend of 6 per cent so that if there are no profits of one year the arrears of dividend are to be carried forward and paid out of the profits of subsequent years. *Staples v. Eastman Photographic Materials Co.* [1896] 2 Ch. 303, 305, 65 L. J. Ch. N. S. 682, 74 L. T. N. S. 479. The testator was therefor entitled to 6 per cent for 1906 and 1907 contingently on there being profits subsequently earned. The meaning of the expression "preference shareholder" is discussed by Lord Cranworth in *Henry v. Great Northern Ry. Co.* (1857) 1 D. G. & J. 606, 636, 44 Eng. Reprint, 858, 27 L. J. Ch. N. S. 1, 3 Jur. N. S. 1133, 6 Week. Rep. 87.

[**Warrington, L.J.**, referred to the statement in the judgment [212] of Kay, J., in *Eastman's Case* [1896] 2 Ch. 303, 309, 65 L. J. Ch. N. S. 682, 74 L. T. N. S. 479, as to the effect of *Henry's Case* (1857) 1 D. G. & J. 606, 44 Eng. Reprint, 858, 27 L. J. Ch. N. S. 1, 3 Jur. N. S. 1133, 6 Week. Rep. 87.]

The question in *Henry's Case* was whether the dividend was preferential or not. No doubt the use of the word "interest" is of very great importance when you are considering whether a dividend is cumulative or not. *Bishop v. Smyrna and Cassaba Ry. Co.* [1895] 2 Ch. 265, 64 L. J. Ch. N. S. 617, 13 Reports, 561, 72 L. T. N. S. 773, 43 Week. Rep. 647, 2 Manson, 429, is an illustration of what Lord Cranworth said was the position of a preference shareholder, and is an instance in which effect was given to the inchoate charge of preference shareholders on profits.

[**Younger, L.J.**, referred to *In re Crichton's Oil Co.* [1902] 2 Ch. 86, 71 L. J. Ch. N. S. 531, 86 L. T. N. S. 787, 18 Times L. R. 556.]

A preference dividend is in the nature of interest charged on profits. The position of a cumulative preference shareholder is 10 B. R. C.

the same as that of a bondholder. The right to dividend is a right accruing *de die in diem*. In administering a trust fund between tenant for life and remainderman there are two established principles. The first is, if the stock is sold *cum* dividend between two dividend days, no profits having been declared available for dividend, the tenant for life is not entitled to claim in respect of lost dividend. That is a rule of convenience, and was established by *Bulkeley v. Stephens* [1896] 2 Ch. 241, 65 L. J. Ch. N. S. 597, 74 L. T. N. S. 409, 44 Week. Rep. 490. The other principle is that if the trustee sells property belonging to the estate he must divide the proceeds between the tenant for life and the remainderman in proportion to their respective interests. That principle is illustrated by *In re Atkinson* [1904] 2 Ch. 160, 166, 73 L. J. Ch. N. S. 585, 53 Week. Rep. 7, 90 L. T. N. S. 825, where a mortgage security on which settled funds were invested was realized by the trustee and proved to be insufficient for the payment of principal and interest in full, and it was held that the sum realized by the security ought to be apportioned between the tenant for life and remainderman in the proportion which the amount due for arrears of interest bore to the amount due in respect of the capital debt.

In re Taylor's Trusts [1905] 1 Ch. 734, 74 L. J. Ch. N. S. 419, 53 Week. Rep. 441, 92 L. T. N. S. 558, had nothing to do with the [213] Apportionment Act 1870. The *dictum* of Buckley, J., in that case, was not necessary for its decision, and was, it is submitted, wrong. The decision throws no light on what would be the case where a dividend is earned and afterwards declared. That case was followed by Astbury, J., in *In re Sale* [1913] 2 Ch. 697, 703. In that case Astbury, J., did not say what his decision would have been if the dividend had been declared.

In *In re Grundy* (1917) 117 L. T. N. S. 470, the dividend had been declared, and Eve, J., thinking that the case was covered by *In re Sale* [1913] 2 Ch. 697, decided the very point which the court is now asked to decide. That case is no doubt directly against our contention; but it is submitted that it was wrongly decided. Eve, J., there held that the tenant for life was not entitled to any part of the dividends. It is submitted that

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the judge misunderstood *In re Armitage* [1893] 3 Ch. 337, 63 L. J. Ch. N. S. 110, 7 Reports, 290, 69 L. T. N. S. 619, to which he was there referred.

[**Lord Sterndale, M.R.:** It all comes back to the question whether the last part of the judgment of Buckley, J., in *In re Taylor's Trusts* [1905] 1 Ch. 734, 738, 74 L. J. Ch. N. S. 419, 53 Week. Rep. 441, 92 L. T. N. S. 558, was right.]

The court cannot look at the declaration of dividend alone; it must also have regard to the memorandum and articles of the company. The directors can only declare an interim dividend for the particular year in which it is earned. The resolution of December 2, 1907, does not expressly state for what period the dividend is declared.

[**Lord Sterndale, M.R.:** Must we not take it as having been declared according to their powers?]

[**Younger, L.J.:** Suppose the directors were to declare in 1920 a dividend which was to be deemed to have been earned in 1900, would not the Apportionment Act apply?]

Yes. The court can have regard to the dividend notice to see what the period is for which the dividend is declared.

[**Younger, L.J.:** It is an interim dividend. The secretary's letter cannot affect the result of the directors' resolution.]

In the resolution of the company the words "wipe off all arrears" occur.

[214] Our submission is wider,—namely, that a cumulative preference dividend, such as is provided for by clause 5 of the memorandum of association in this case, is in the nature of interest, which if not payable in one year is carried forward, and is a charge on the profits of subsequent years.

[They also referred to *In re Odessa Waterworks Co.* (1897) [1901] 2 Ch. 190, note, and Buckley on Companies, 6th ed., p. 62.]

D. D. Reid, for the trustees of the testator's will.

Whinney, in reply. The Apportionment Act 1870 did not really come in question in *In re Taylor's Trusts* [1905] 1 Ch. 734, 74 L. J. Ch. N. S. 419, 53 Week. Rep. 441, 92 L. T. N. S. 558. The principle of that case is applicable to the present. Buckley, J., there said that you could not throw back income if

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it was contingent. The directors could not, by saying so, alter the nature of the dividends.

[**Younger, L.J.:** Article 125 shows that the persons who are entitled to the dividends are the shareholders on the register at the time of the declaration of the dividend.]

The directors acted exactly within their powers, and in accordance with the rights of the shareholders.

It is submitted that the Apportionment Act 1870 does not apply to the present case, but that, if it does, it has not the extended operation which Peterson, J., thought it had.

Cur. adv. vult.

The following judgments were delivered:

Lord Sterndale, M.R.: This appeal from Peterson, J., raises two questions: One concerned only with the construction of the particular will under consideration, the other a question of general importance. I propose to deal with the question of construction first. [His Lordship dealt with the question of maintenance raised by the originating summons, and held (the Lords Justices concurring) that the construction placed upon the two maintenance clauses in the will by Peterson, J., was correct, and that the appeal on that point failed, and should be dismissed. He continued:] The other question is one of [215] general importance, and it is whether the Apportionment Act 1870 applies to certain dividends paid upon shares held by the testator,—that is, whether his estate is entitled as against the persons interested under his will to a portion of those dividends as having accrued before his death. The facts are as follows. [His Lordship referred to the profits and losses made by the company in the years 1904, 1905, 1906, and 1907, and to the dividend paid in the last of those years, and continued:] If this dividend was paid in respect of each year the testator's estate is entitled to a sum representing the amount accrued in the year 1905 up to the time of his death, but if it was paid only in respect of the year 1907, although sufficient in amount to cover the unpaid dividends of the previous years, then the testator's estate is not entitled to any part of it. In order to decide this

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question it is necessary to consider the terms of the Apportionment Act 1870, and also the provisions of the memorandum and articles of association of the company in order to ascertain the rights of the shareholders and the powers of the directors as to dividends. [His Lordship read clause 5 of the memorandum and articles 119, 120, 121, and 126, observing with regard to article 126 that he thought it referred only to dividends which had been declared and so become payable. He continued:] The sections of the Apportionment Act which relate to this matter are §§ 2 and 5. Sect. 2 provides: "All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." Sect. 5 provides: "The word 'dividends' includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this [216] act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made." I agree with Peterson, J., that under these sections the important matter to be considered is not the period in which the divisible revenue may be earned, but the period in or for which the payment of such divisible revenue shall be declared or expressed to be made. It is however admitted that such declaration must be made in accordance with the powers conferred upon the directors, and that a declaration that the dividend was paid in respect of a period by which in law it could not be paid would be of no effect.

It is necessary therefore to see what is the effect of the provisions as to cumulative dividends. The two views maintained before us may, I think, be stated thus: The respondents' view is that the shareholders acquire a right in each year to a 6 per cent or 12 per cent dividend, but that it can be paid only when profits

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are earned and a dividend declared, and that when the dividend is declared it is declared and paid in respect of each year in which no dividend has been paid. The appellants, however, contend that no right to dividend is acquired at all until profits are made and a dividend declared, and that each dividend is declared in respect of the current year, the shareholder, by virtue of the provision that dividends shall be cumulative then, and not till then, acquiring a right to have for that year not 6 per cent or 12 per cent, but that sum with an addition of the amount of the dividends which they did not receive in the previous years. I think the latter is the correct view. The shareholders, in my opinion acquire no right to any dividend until there are, in the language of clause 5 of the memorandum, "profits or other moneys of the company available for dividend which it shall from time to time be determined to distribute." It was argued that they had an inchoate right which became absolute on the happening of the events mentioned. I am not sure that I understand clearly the nature of an inchoate right, but if there be a right which [217] must be qualified by an adjective I think it is more correctly described as a conditional right; for, in my opinion, it does not arise until the two conditions of the existence of profits and the determination to distribute come into existence. When these conditions are fulfilled the shareholders acquire the right to add to the dividend for the year the same amount for each year in which no dividend has been paid. If this be correct, the dividend which is paid is not in respect of each year, but in respect of the year in which profits are declared for division, the amount being, by virtue of the cumulative clause, determined by the whole amount of dividends unpaid.

Reliance was however placed upon the terms of the declarations of dividend by the directors at their meeting on December 2, 1907, and by the company at its general meeting on February 4, 1908. The declaration of the directors was in these terms: "It was resolved to declare and forthwith pay an interim dividend at the rate of 18 per cent on the preferred and 24 per cent on the deferred shares, which payment will cover the cumulative dividend on the preferred for three years ending June, 1907, and on the deferred for two years ending 1906." The declara-

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tion by the company was as follows: "The chairman intimated that it was proposed to distribute a further dividend of 3 per cent on the preferred ordinary and 18 per cent on the deferred ordinary shares, which would wipe off all arrears of the cumulative dividends on both classes of shares up to December 31, 1907, leaving a balance of undivided profit of 24,758*l.* 1*s.* 11*d.* to be carried forward to new accounts." It was argued that the effect of these declarations was that the dividends were declared in respect of each year in which there were unpaid dividends. I doubt very much if this is the correct interpretation of these declarations. They seem to me to be declarations of an interim dividend of 18 per cent and 24 per cent, and a final dividend of 3 per cent and 18 per cent for the year, with an explanation that this amount is made up by taking into account the unpaid dividends of former years, and if so they are in accordance [218] with what I think was the only declaration which the directors had power to make. As I have before pointed out, if they bear the meaning contended for by the respondents—that is, that the declaration was in respect of each year—I think they exceeded the powers of the directors, and if so they cannot alter the legal position of the shareholders. If the declaration be, as I think it is and must be, in respect of the year in which divisible profits exist, the Apportionment Act does not apply to the dividends so declared. I ought to notice the argument placed upon the word "arrears." It is a convenient expression, and is often used in cases of this description, but it cannot be taken as meaning arrears in the strict sense of the word, which I take to be sums of money in respect of which the date of payment has passed; for, as I have already pointed out, no dividends were due or payable in the earlier year, because the conditions essential to payment had not been performed. So far I have dealt with the matter apart from authority, but there is authority in favor of the view which I have expressed.

In *In re Taylor's Trusts* [1905] 1 Ch. 734, 738, Buckley, J., dealing not with a question of dividends, but of interest on a bond payable only out of net earnings of the company, which gave the bond with a proviso that any unpaid interest should be paid out of the net earnings of any subsequent year, used these
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words: "Suppose that in the year 1904 there was no fund available, and the tenant for life died on December 31, 1904. There was no income, I apprehend, payable to that tenant for life, because the obligation is to pay out of a fund, and there was no fund. If in the year 1905 a fund came into existence, the interest calculated for the year 1904 would be payable, I agree; but it would be income of the year 1905, and not income of the year 1904. And if a second tenant for life were in the enjoyment of the property in 1905, that tenant for life, and not the previous tenant for life, would, it seems to me, take that interest." It is true that in that case there was no question of the Apportionment Act, but the principle stated in that passage is equally applicable to cumulative [219] dividends and to the cumulative interest in that case. This statement of the learned judge was said to be *obiter*, and not necessary for the decision of the case. It may be that he might have arrived at the same conclusion on grounds which would not require the application of the principle stated in the words I have cited, but I am inclined to think that his decision was really based on the principle there stated. This is, however, immaterial; for whether it be a *dictum* or a part of the judgment it is, though the statement of an eminent judge, not binding on us here. We have, therefore, especially in view of its application by Eve, J., in a case to be mentioned later, to consider whether it is correct.

In *In re Sale* [1913] 2 Ch. 697, 703, Astbury, J., adopted and followed this statement of Buckley, J. I think that the case might have been decided by that learned judge without resort to that principle, but the concluding words of his judgment seem to me to show that he adopted it as correct. They are as follows: "The resolution creating the cumulative preference shares is in common form, and the articles provide for the declaration of dividends in the usual way out of profits and for the creation of a reserve fund at the directors' discretion. . . . The life tenant had no right to a fixed dividend charged on profits in any event. She had merely a right to a preferential dividend as and when the directors of the company chose to declare it, and no dividend for any part of the life tenancy period was in fact earned or declared." Then, after a passage which is immaterial

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to this case, his Lordship goes on: "On the true construction of the will the testatrix, in my judgment, intended that on the life tenant's death the shares and all dividends declared for periods subsequent to that date should belong to the remaindermen absolutely. The claim of the life tenant's executors therefore fails."

Finally, in *In re Grundy* (1917) 117 L. T. N. S. 470, Eve, J., following the decisions of Astbury, J., applied this principle to a case which is exactly similar to that now under our consideration, and it was conceded that in order to adopt the respondent's contention [220] in this case we must overrule the decision in *In re Grundy, supra*. I think that we ought not to do so, and the statement of the law by Buckley, J., in *In re Taylor's Trusts* [1905] 1 Ch. 734, 74 L. J. Ch. N. S. 419, 53 Week. Rep. 441, 92 L. T. N. S. 558, was correct.

I wish to mention, in order to show that I have not overlooked them, the expressions of other learned judges to which we were referred, of "interest" and "arrear" as applying to cumulative dividends. The point under our consideration was not before those learned judges in those cases, and I do not think they had any intention of using the words "arrear" in the strict sense which I have already mentioned, or "interest" as meaning interest which became due and payable in the years in which the dividends were unpaid. These amounts clearly did not become due or payable in those years, for they were only payable out of divisible profits, and there were none.

I think on this second point the appeal should be allowed, and that there should be a declaration that the Apportionment Act does not apply to these payments of dividend.

As each party has succeeded on one point I think there should be no costs of this appeal.

Warrington, L.J.: Two questions have to be decided,—one of general interest, the other one of construction on the particular will.

The first question is whether a cumulative dividend of an amount large enough to cover unpaid dividends for two years and a half prior to that on which it was declared and paid is, for the purposes of the Apportionment Act, to be treated as accruing
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from day to day during the period of three years or only during the year in which it was declared.

The testator, who died on November 7, 1905, was possessed of preferred ordinary and deferred ordinary shares in a company carrying a cumulative dividend in the case of the preferred shares at the rate of 6 per cent per annum, and in the case of the deferred ordinary shares at the rate of 12 per cent per annum. By his will he bequeathed these [221] shares to his son Ronald, who died on April 9, 1918. The appellants are his executors.

The memorandum of association contains the following provision. [His Lordship read clause 5 of the memorandum and also articles 119, 120, and 121, and continued:] Provision was made for an annual balance sheet and an annual audit.

In the first half of the year 1904 an interim or instalment dividend was paid on both classes of shares. In the second half of that year there was a small profit, but no dividend was declared; in 1905 there was a loss; in 1906 there was a profit, but little more than enough to make good the previous loss. No dividend was declared in either of these two years. In 1907 during both half years there was a large profit. On December 2, 1907, the directors resolved to declare and forthwith pay an interim dividend at the rate of 18 per cent on the preferred and 24 per cent on the deferred shares, "which payment will cover the cumulative dividend on the preferred for three years ending June, 1907, and on the deferred for two years ending 1906."

On February 4, 1908, it was resolved by the company in general meeting "to distribute a further dividend of 3 per cent on the preferred ordinary and 18 per cent on the deferred ordinary shares, which would wipe off all arrears of the cumulative dividends on both classes of shares up to the 31st December, 1907." The payment of the interim dividend was accompanied by a letter of the secretary of the company dated December 3, 1907, in the following terms. [His Lordship read the letter.] The executors of the testator claim that these dividends must be apportioned, and that they are entitled to the part apportioned to the period which elapsed from July 1, 1904, to November 7, 1905. Peterson, J., has adopted this view, and the executors of the legatee appeal. The judgment of Peterson, J., is founded on the terms

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of the Apportionment Act 1870. The material parts of that act are §§ 2 and 5. [His Lordship read the sections.]

The first question to be considered is what is the nature of a shareholder's right to a cumulative dividend. It is, in my opinion, nothing more than a right to participate in [222] profits available for dividend which in accordance with its regulations the company has from time to time determined to distribute. In fact the shareholder has no right to a dividend, whether cumulative or otherwise, until there are profits available, and the company by the proper authority has determined to distribute them. It follows that when profits are available and the company determines to distribute them, it is the shareholder who is then entitled to the shares who takes the dividend, and not the person entitled to them in past years, though the dividend may in the case of cumulative dividend be large enough to cover the amount which would have been paid in past years if there had been profits available, but which was not paid because there were no such profits. See *In re Taylor's Trusts* [1905] 1 Ch. 734, 74 L. J. Ch. N. S. 419, 53 Week. Rep. 441, 92 L. T. N. S. 558; *In re Sale* [1913] 2 Ch. 697; and *In re Grundy* (1917) 117 L. T. N. S. 470. The articles, in my opinion, contemplate annual accounts, and the practice of the company was in accordance with that view. When, in 1907, after an interval of two years and a half, during which there were no profits applicable for dividends, a dividend was at last declared, it was, in my opinion, not three dividends, but one dividend, although its amount was conditioned by the fact that in previous years no dividend had been paid. In my opinion, therefore, the interim dividend declared in December, 1907, and the final dividend declared in February, 1908, were both for or in respect of the year 1907.

Peterson, J., however, while admitting the correctness of the decisions above referred to, thought that they did not govern the present case, in which the point to be decided is whether the Apportionment Act is to be applied. But, under § 5 of the act, if the payment of divisible revenue is declared or expressed to be made for a particular year, that is the period during which the divisible revenue is to be deemed to have accrued by equal daily increment; and the dividend, which is only a part of that divisi-

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ble revenue, must be considered as accruing from day to day during the same period; for I think it is clear that the provision as to the [223] accrual of divisible revenue is intended to fix the period during which dividends are to be considered as accruing for the purposes of § 2.

As I have already indicated, I think the true view of the resolution of the directors as to the interim dividend and that of the company confirming the recommendation of the directors as to the final dividend is that the payment thereby declared or expressed to be made was for or in respect of the year 1907. The statement as to what the dividend would "cover" or "wipe off" is, in my opinion, nothing but an explanation of the rate per cent at which the dividend was calculated. I think the same may be said of the secretary's letter; but if it goes further it cannot, in my opinion, alter the effect of the formal resolution. No dividend, therefore, having accrued at the death of the testator, there is no ground for apportionment, and, in this respect, the order of Peterson, J., must, in my opinion, be reversed.

Younger, L.J.: The second question raised by the appeal is whether the dividends received upon the testator's shares in Morgan, Wakley, & Company, Ltd., belong to the estate of Ronald as the specific legatee of these shares, or whether to any extent they form, under the Apportionment Act, part of the testator's general estate.

The facts which raise the question are simple. For convenience they may be partly restated.

The testator was the holder in the company of 847 preferred shares, 1,920 deferred shares, and of a moiety of 5 preferred shares. All these shares he bequeathed to Ronald, and in the event they became, with all dividends accruing thereon, from the date of his death Ronald's absolute property. The financial year of the company ends on December 31. The testator died on November 7, 1905.

Dividends upon the shares were paid up to June 30, 1904. In respect of the period from June 30, 1904, to December 31, 1904, a profit of 1,616*l.* 1*s.* 4*d.* was made, but no dividend was paid. For the year 1905, the year of the testator's death, a loss

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of 14,565*l.* 3*s.* 2*d.* was made. In 1906 a profit [224] of 16,617*l.* 12*s.* 3*d.* was made, but no dividend paid. In 1907, from January to June, a profit of 21,095*l.* 1*s.* 6*d.* was made, and in the same year, from July to December, the company earned a profit of 32,885*l.* 11*s.* The question arises with reference to a so-called interim dividend paid on December 31, 1907, as a result of these profits earned in the year 1907. I need not again read the directors' resolution for payment of the interim dividends nor the letter of the secretary transmitting them. These have already been set forth. The question is whether the interim dividends on both classes of shares, so resolved upon by the directors on December 2, 1907, and paid on December 3, were as to any part of them paid in any true sense in respect of the period from June 30, 1904, to November 7, 1905, the date of the testator's death, or whether they were paid in respect of the financial year of the company ending December 31, 1907, in the course of which they were in fact distributed.

If article 121 is alone to be regarded these dividends must be taken to have been "paid to the members on account, and in anticipation of the respective dividends for the current year." That is the only power which the article gives to the directors. But the question was in argument dealt with on more general grounds, and it is, I think, right so to deal with it.

Now in the case of this company the broad provisions as to preferred dividends are in a form very usual. Taking for convenience of statement the dividend rights of the preferred ordinary shares, the memorandum of association provides that "the profits or other moneys of the company available for dividend which it shall from time to time be determined to distribute are to be applicable first to the payment of a fixed cumulative dividend at the rate of 6 per cent per annum on the capital paid up" on these preferred ordinary shares. That dividend is payable only out of profits (article 120), and it is only payable if the directors, with the sanction of a general meeting, think fit to declare it (article 119), or if they determine on and declare an instalment by way of interim dividend (article 121). Other articles [225] of the company contain usual provisions for the making out of a balance sheet every year to be laid before the

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company in general meeting (article 132) for the examination thereof by the auditors (article 141), and for a report by them on the balance sheet to be read at every ordinary meeting (article 143). In other words, the articles contemplate annual distributions by the directors with the authority of the company given at the annual ordinary general meeting, and interim distributions in anticipation thereof made on the authority of the directors alone. But no shareholder in this company, preferred or otherwise, is entitled to any dividend unless there are profits existing and made available for its payment in one or other of the ways just mentioned, a preferred ordinary shareholder being, however, further entitled to this right, that if and so soon as profits are so made available for dividend they have first to be applied ratably in payment of the dividend on the preferred ordinary shares. This therefore is clear, that either if there are no profits or if there are none made available for payment of dividend as above, no preferred ordinary dividend, cumulative though it be, can be truly said to be in arrear if, by that expression, it is connoted that the company has made default in payment of the dividend in question. There has not been any such default, because in the case supposed no obligation to pay has arisen. Putting it otherwise, there is in this essential particular no real analogy between the expressions "arrear of preference dividend" and "arrear of interest," although doubtless it is from this last expression that the first has for common parlance undoubtedly been borrowed.

But the preferred ordinary dividend is cumulative. How, then, is effect to be given to that right if, although not punctually paid, the dividend is still not "in arrear"? Easily enough, I think, if the true nature of such a dividend is borne in mind. A cumulative preferred dividend is, in my opinion, correctly described as one which gives to the holder of the preferred shares *pari passu* with all other holders of shares of the same class a right to receive out of a fund of profits made available for dividend under the articles of the company [226] and in priority to the holders of all junior shares in it a sum measured by the percentage rate and the period of time over which the dividend has not been paid in whole or in part. The dividend when paid—not

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being in any true sense in arrear up to that moment—is paid out of the fund then made available for its payment for the year or other financial period of the company in which it is paid. It is not paid in respect of any previous period of nonpayment—when it was neither due nor payable—it is paid exactly in the same way as is a dividend at the same time paid out of any residue of the dividend fund to holders of ordinary shares in respect of which there has been no distribution for a period as long or it may be even longer.

In other words, in respect of the time with reference to which dividends are paid, there is no difference between a cumulative preference and an ordinary dividend. Each is a dividend for the year or other financial period of payment; that the preferred dividend is preferential, fixed, and cumulative means only this, that these are the factors by which the priority and the amount of the share of the dividend fund appertaining to the preference shareholder are ascertained.

These general views are very clearly expressed in the regulations of this company. The fixed cumulative dividend here is by the memorandum one dividend, and not many dividends—not a cumulation of separate dividends as Mr. Romer phrased it—and the surplus “sixth” in its nature an ordinary dividend is expressed to be a “further” dividend.

And for this view of the matter there is high authority. The principle was enunciated by Buckley, J., in *In re Taylor's Trusts* [1905] 1 Ch. 734, 738, 74 L. J. Ch. N. S. 419, 53 Week. Rep. 441, 92 L. T. N. S. 558, where, dealing with what is called an income bond, he used the words already cited by the Master of the Rolls. Peterson, J., treats these words as *obiter dicta*, but in my view they lay at the root of the decision. Buckley, J., there had to determine whether a tenant for life was entitled to any part of the purchase money of certain settled income bonds sold for a sum representing less than [227] the amount of principal secured, with interest to date. The learned judge decided that the tenant for life was entitled to nothing out of the purchase price, only because he held that so long as there was no income fund of the company existing for its payment, there was no interest due or “in arrear” on the bonds; and I believe the principle

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upon which he proceeded to be correct and to be directly applicable to such a case as the present. The only difference here is that in this instance the profits are only divisible if made available for dividend. In that case they were divisible if earned. In other words, the bond there was like the preference share in *Bishop v. Smyrna and Cassaba Ry. Co.* [1895] 2 Ch. 265, 64 L. J. Ch. N. S. 617, 13 Reports, 561, 72 L. T. N. S. 773, 43 Week. Rep. 647, 2 Manson, 429; here the shares are similar to those in *In re Crichton's Oil Co.* [1901] 2 Ch. 184, 70 L. J. Ch. N. S. 639, 49 Week. Rep. 556, 34 L. T. N. S. 864, 8-Manson, 319. Buckley, J's decision has been followed and so applied by Astbury, J., in *In re Sale* [1913] 2 Ch. 697, 703, and under circumstances identical with this case by Eve, J., in *In re Grundy* (1917) 117 L. T. N. S. 470, a case not cited to Peterson, J.

Now that learned judge decided that the dividend here was apportionable, not so much, I think, because he disagreed with any of the views here expressed, as because he felt himself constrained so to hold by the express terms of § 5 of the Apportionment Act 1870, which provides that "all such divisible revenue shall, for the purposes of this act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made." Peterson, J., was of opinion that in this case the payment of the interim dividend was in the directors' resolution expressed to be made in respect of a period prior to the testator's death; and although it is clear, as above appears, that no part of the divisible revenue had in fact been earned during that period, he felt compelled to hold that the rights of the parties were, under the statute, fixed by that expression of the directors.

I take a different view, and for several reasons. First, [228] I do not so read the directors' resolution of December 2, 1907; nor do I so read the secretary's letter of the 3d,—although that letter can, in my judgment, have no effect upon the case. But further, in my opinion, the directors had no power under the articles here to make any such allocation if in fact they made it. Their power was, as I have already pointed out, "to declare an instalment to be paid to the members on account and in an-

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tiicipation of the respective dividends for the current year," and Mr. Romer did not contend before us that under the act a declaration or expression which it was not competent for directors to make could have any effect in determining rights.

Accordingly, being clear as I am that the interim dividend both on the preferred and the deferred ordinary shares was in fact only a dividend in anticipation of that for the year 1907, there is here, in my opinion, no case for apportionment. The dividends belong altogether to the testator's son, and the declaration of the learned judge should, I think, be altered in that sense.

Perhaps I ought to say a word with reference to one matter alluded to by Mr. Preston which may be thought to be affected by the present decision. He instanced in his argument the case of a class of cumulative preference shares, some issued and paid up, say, in the year 1915, others issued and paid up, say, in the year 1917; no dividends paid in 1915, 1916, 1917, or 1918, but profits earned in 1919 sufficient in amount for payment of a dividend on the shares issued in 1915 both for that year and for 1916, but no more; on that Mr. Preston contended that if the principle now adopted in this judgment were to be held applicable the holders of the 1915 shares would not receive the whole fund available for dividend, although in such circumstances it had always been assumed that they were so entitled, and many distributions had been made on that footing. I agree, but such distributions remain, in my judgment, perfectly right on the principle of this judgment. The shares supposed are all of the same class; some of them by reason of their earlier issue and payment up of capital have a larger claim on the dividend fund than others. It [229] is proper distribution as between the two sets of such shares to apply the first available dividend fund in producing equality amongst them all,—that is, by first extinguishing the excess. The principle here enunciated has in these distributions, although perhaps unconsciously, been in this respect in no way disregarded.

Appeal allowed.

Solicitors: *Lowless & Company, for Vachell & Company, Cardiff; Woodcock, Ryland, & Parker, for Wade & Son, Newport, Mon.*

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Note.—Right of transferee or legatee of stock entitled to cumulative dividends, to dividends subsequently declared covering arrearages theretofore existing.

The few other decisions on the question agree with the reported case (*RE WAKLEY, ante, 674*) in holding that stock having the right to cumulative dividends constitutes no exception to the general rule that dividends belong to the one who owns the stock at the time it is declared.

In *Boardman v. Lake Shore & M. S. R. Co.* (1881) 84 N. Y. 157, it was held that payment of arrears of cumulative dividends from preferred stock might be enforced by one who became the owner of the stock subsequently to the time when the arrearage took place. The court said: "The rule is, no doubt, that a shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made or a dividend declared. When this is done, the dividend belongs to the owner of the share at the time, and until the dividend is declared, it is a portion of the assets of the corporation, and an assignment of the stock carries with it its proportionate share of such assets, which necessarily include as an incident all undeclared dividends. These are the subject of assignment, and pass with the transfer of the stock as a portion of the capital of the company. *Hyatt v. Allen* (1874) 56 N. Y. 553, 15 Am. Rep. 449. It follows that upon the transfer of the stock of the plaintiffs' testator to him, the assignment carried with it all right to the earnings or profits or claims to dividends, which ordinarily and lawfully was embraced within the scope of such a transfer, unless the facts accompanying the transfer render the case at bar an exceptional one, and not within the general rule. Such is urged to be the fact by the appellant's counsel, and it is insisted that the company made a contract to pay certain dividends upon a contingency, which was the acquisition of net earnings by the company, and the right only becomes complete upon the happening of such contingency; and that the holder of the stock with whom the contract was made would become a creditor upon the acquisition of such net earnings; and that the plaintiffs cannot claim these dividends in their capacity as stockholders, for they have never been declared, but only in the capacity of one who has made a contract with a corporate body. We are unable to perceive the force of this position; for conceding that the right of the plaintiffs depends upon a contract, that contract is connected with, relates to, and constitutes, an integral part of the plaintiffs' right as a stockholder. It cannot be separated from the rights accruing by virtue of the stock which the plaintiffs hold; and being thus a part and parcel of the same, it

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passes with the transfer as one of its incidents, and as composing an essential element thereof. A sale or assignment of the stock transferred by the operation of law, all benefits to be derived from the same, and all profits, income, or dividends or right to dividends by contract, which formed a constituent, valuable, and an inseparable portion of the stock. When the contingency happened specified in the contract, the rights to dividends became fixed, and existed independent of any act of the corporation or its officers. It became absolute and perfect in the stockholder without a declaration to that effect, and passed as an incident of the stock upon the transfer."

So, also, in *Jermain v. Lake Shore & M. S. R. Co.* (1883) 91 N. Y. 493, it was held that the transferee of stock upon which dividends had been guaranteed, but upon which no dividends had been declared prior to the transfer, was entitled to them when declared, including those for periods for which, under the terms of the guaranty, dividends should have been declared and paid before he received the transfer. The court, after pointing out that a share of stock represents the interest which the stockholder has in the capital and net earnings of the corporation, and therefore that, before a dividend has been declared, a share of stock represents the whole interest which the stockholder has in the corporation and passes upon a transfer of his stock, so that dividends subsequently declared, without reference to the source from which, or the time during which, the funds divided were acquired by the corporation, necessarily belong to the holder of the stock at the time of the declaration, went on to say: "But the claim on the part of the appellant is that inasmuch as these guaranteed dividends were payable in 1864, long before the transfer of any stock to this plaintiff, they are to be treated as dividends then declared, and therefore payable to the person who then held the stock; that in 1864, by reason of the existence of net earnings sufficient to make the guaranteed dividends, the right to such dividend became vested in those then holding the guaranteed stock; that the net earnings then on hand representing the amount due for the guaranteed dividends were no longer a part of the capital or assets of the corporation, and that the right to them ceased to be an incident of the stock. This reasoning does not satisfy us. These net earnings were in no way set apart or appropriated for the benefit of the holders of the guaranteed stock. They were not even held by the company. The right of the guaranteed shareholders was repudiated and denied, and the net earnings were otherwise appropriated. They were no more legally appropriated to the payment of the guaranteed dividends than the property of a debtor is in law appropriated to the payment of debts which he refuses to recognize. The dividends, therefore, remained payable upon the stock to the holders of the stock. It matters not that payment could have

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been enforced by the holder of this stock; he did not then enforce it, and did not receive payment. He did not, so far as appears in the case, in any way separate his right to dividends from the stock as an incident thereto. It remained like interest payable upon any obligation which had not been paid, but which was due. An assignment of the obligation in such a case carries with it the right to receive the overdue interest, the interest being an incident of the obligation. Interest after it becomes due may be assigned to one person, and the principal obligation may be assigned to another, as the owner of this stock could have assigned these guaranteed dividends to one person and the stock to another; but until he did so or did some act to separate the guaranteed dividends from the stock, a sale or assignment of the stock carried with it a right to the dividends, as an incident thereto."

In *Manning v. Quicksilver Min. Co.* (1881) 24 Hun, 360, the owner of certain preferred shares of stock in a mining company, after having sold them to one person, assigned to another all his rights, title, and interest in and to the interest due upon the assigned shares of stock which he had previously owned. By the terms of the certificate, interest was guaranteed to be paid annually, but out of the net earnings of each year, providing so much in the year preceding had been earned. It did not appear that there had been any separation of this interest from the other assets of the company, or that any of the earnings of the company had been assigned to the payment of the interest. It was held that the right to recover the interest was merely an incident to the shares themselves and depended upon the title thereto, and that the assignee of the estate could not maintain an action to recover it or to compel the company to account therefor.

But in *Bates v. Androscoggin & K. R. Co.* (1860) 49 Me. 491, it was held that a subscriber for preferred stock, which, by its terms, entitled the holder to the payment of \$6 per share semiannually from the net earnings of the company until the net earnings should be sufficient to pay an interest of 6 per cent per annum on all stock issued and all outstanding bonds, while not entitled to interest after the transfer of the stock, might recover for the proportion of the interest period during which he retained ownership.

"Payment of dividends to preferred stockholders differs from such payment to the holders of common stock only in that they are entitled to dividends in priority to any dividends upon the common stock." *Miller v. Ratterman* (1890) 47 Ohio St. 141, 24 N. E. 496.

In the case of common stock it has been held that dividends declared after the testator's death, although out of profits made during his lifetime, are a portion of the income of the legatees for life, and not of the corpus of the estate. *Bates v. Mackinley* (1862) 31 10 B. R. C.

Beav. 280, 54 Eng. Reprint, 1146, 31 L. J. Ch. N. S. 389, 8 Jur. N. S. 299, 5 L. T. N. S. 783, 10 Week. Rep. 241; *Re Kernochan* (1887) 104 N. Y. 618, 11 N. E. 149.

A dividend is considered parcel of the mass of corporate property until declared, and therefore incident to and parcel of the stock up to the time it is declared, and before its declaration will pass with the sale or devise of the stock. Whosoever owns the stock prior to the declaration of a dividend owns the dividend also, but the moment the dividend is declared, it becomes then separate and distinct from the stock, and the dividend falls to him who is proprietor of the stock of which it was theretofore incident. *McLaren v. Crescent Planing Mill. Co.* (1906) 117 Mo. App. 40, 93 S. W. 819.

E. S. O.

[ENGLISH DIVISIONAL COURT AND COURT OF APPEAL.]

H. DAKIN & COMPANY, LTD. v. LEE.

[1916] 1 K. B. 566.

Also Reported in 84 L. J. K. B. N. S. 2031, 113 L. T. N. S. 903, 59 Sol. Jo. 650.

Building contract — Substantial performance — Right of recovery.

Where a builder has supplied work and labor for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1) the work that he has done has been of no benefit to the owner; (2) the work he has done is entirely different from the work which he has contracted to do; or (3) he has abandoned the work and left it unfinished.

Decision of Divisional Court (Ridley and Sankey, J.J.) affirmed.

(December 15, 1914; July 6, 1915.)

APPEAL of the plaintiffs from the judgment of Mr. Muir Mackenzie, official referee.

The plaintiffs were builders. The action was brought to recover the sum of 352*l.* 4*s.* 4*d.*, the balance of the price of certain repairs carried out by the plaintiffs at the defendant's house, 37 Wimbledon Park Road, Wandsworth. Part of the claim related to work contained in a specification which by a verbal contract the parties had agreed should be done for 264*l.* The balance of 10 B. R. C.

the claim was for extras and additional work. The only question raised on the appeal related to the claim in respect of the contract work.

The defense was that the work referred to in the specification had not been completed, and the official referee found as a fact that the contract had not been fulfilled in the three following instances: (1) A letter from the plaintiffs which accompanied the specification stated that the concrete which was to be placed under a part of one of the side walls of the house, which was to be underpinned, was to be of the depth of 4 feet. Only 2 feet of concrete was placed there. (2) Columns of hollow iron, 5 inches in diameter, were to be used for the support of a certain bay window. The columns supplied were of solid iron 4 inches in diameter. (3) The joists over the bay window were to be cleated at the angles and bolted to caps and to each other. This was not done. The defendant [567] had resumed her occupation of the house after the plaintiffs' workmen had left, and after receiving the plaintiffs' account she offered to settle the whole claim by a payment of 250*l.* in addition to a sum of 50*l.* which she had already paid.

The official referee held that the plaintiffs had not performed their contract, in that the defendant had been given something different from, and less strong and secure than, what she was entitled to have under the contract, and that the plaintiffs were therefore not entitled to recover any part of the contract price or any sum in respect of the contract work. The official referee disallowed the claim for extras, but allowed a sum of 70*l.* for the additional work, which was less than the sums paid before action and paid into court, and the official referee therefore entered judgment for the defendant.

The plaintiffs appealed.

Bromley Eames, for the plaintiffs. The result of the judgment of the official referee is that, although the plaintiffs have carried out their contract except in three unimportant particulars, the defendant gets the benefit of the work which has been done without paying anything for it. The authorities show that a builder who has been working under a contract which he has

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not carried out in its entirety is nevertheless entitled to recover on a *quantum meruit*, unless either the work done is useless to the building owner, or is in the result something quite different from that which was contracted for, or unless the builder has himself abandoned the contract and refused to complete the work. *Farnsworth v. Garrand* (1807) 1 Campb. 38, 10 Revised Rep. 624; *Thornton v. Place* (1832) 1 Moody & R. 218; *Chapel v. Hickes* (1833) 2 Crompt. & M. 214, 149 Eng. Reprint, 738, 4 Tyrw. 43, 3 L. J. Exch. N. S. 38. The facts of this case do not bring it within either of those categories. The decision in *Ellis v. Hamlen* (1810) 3 Taunt. 52, 128 Eng. Reprint, 21, 12 Revised Rep. 595, which at first sight seems opposed to the plaintiffs' contention, really turned on the point that the defendant had not acquiesced in the deviations from the contract. See *Burn v. Miller* (1813) 4 Taunt. 745, 128 Eng. Reprint, 523, 14 Revised Rep. 655. The sum which the plaintiffs are entitled to recover is the contract price less the cost of completing the work in accordance with the contract. In the case of work which cannot now be [568] altered there must be a disallowance of the profit on that part of the work. *Stegmann v. O'Connor* (1899) 81 L. T. N. S. 627. [*Munro v. Butt* (1858) 8 El. & Bl. 738, 120 Eng. Reprint, 275, 4 Jur. N. S. 1231; *Lovelock v. King* (1831) 1 Moody & R. 60; *Mondel v. Steel* (1841) 8 Mees. & W. 858, 151 Eng. Reprint, 1288, 1 Dowl. N. S. 1, 10 L. J. Exch. N. S. 426; *London School Board v. Wall* (1890) 2 Hudson, Bldg. Contr. 3d ed. p. 165; and *Whitaker v. Dunn* (1887) 3 Times L. R. 602, were also referred to.]

J. D. Cassels and **B. L. A. O'Malley**, for the defendant. The plaintiffs are suing on a contract by which they agreed to do certain specified work for a certain sum. It is admitted that in some respects the work has either not been completed or has not been carried out in accordance with the contract. In these circumstances the plaintiffs cannot recover anything. *Appleby v. Myers* (1867) L. R. 2 C. P. 651, 36 L. J. C. P. N. S. 331, 16 L. T. N. S. 669. They cannot recover the contract price because they have not carried out the contract. They cannot recover on a *quantum meruit* unless there was a fresh contract to pay for the work actually done. *Munro v. Butt* (1858) 8 El. & Bl. 738, 10 B. R. C.

120 Eng. Reprint, 275, 4 Jur. N. S. 1231; *Sumpter v. Hedges* [1898] 1 Q. B. 673, 67 L. J. Q. B. N. S. 545, 78 L. T. N. S. 378, 46 Week. Rep. 454. It is not suggested that any new contract was expressly made, and the fact that the defendant has been living in the house is not evidence from which a contract to pay for the work can be implied. *Forman & Co. Proprietary v. Ship Liddlesdale* [1900] A. C. 190, 69 L. J. Prob. N. S. 44, 82 L. T. N. S. 331, 9 Asp. Mar. L. Cas. 45. The deviations from the contract were of a serious character, particularly in regard to the concrete foundation. *London School Board v. Wall* (1890) 2 Hudson, Bldg. Contr. 3d ed. p. 165. [*Lucas v. Godwin* (1837) 3 Bing. N. C. 737, 132 Eng. Reprint, 595, 4 Scott, 402, 3 Hodges, 114, 6 L. J. C. P. N. S. 205; *Craven v. Tickell* (1789) 1 Ves. Jur. 60, 30 Eng. Reprint, 230; *Williams v. Fitzmaurice* (1858) 3 Hurlst. & N. 844, 157 Eng. Reprint, 709; *Wilkinson v. Clements* (1872) L. R. 8 Ch. 96, 42 L. J. Ch. N. S. 38, 27 L. T. N. S. 834; and *Sinclair v. Bowles* (1829) 9 Barn. & C. 92, 109 Eng. Reprint, 35, 4 Ryan & M. 1, 7 L. J. K. B. 178, were also referred to.]

Bromley Eames, in reply. This court is not bound by the official referee's findings of fact. *Wynne-Finch v. Chaylor* [1903] 2 Ch. 475, 72 L. J. Ch. N. S. 723, 52 Week. Rep. 24, 89 L. T. N. S. 123, 19 Times L. R. 631.

Ridley, J.: In my opinion the decision of the official referee cannot be supported. The plaintiffs entered into a contract with the defendant to execute certain repairs at her house in accordance with a specification for the sum of 264*l.* 2*s.* 10*d.* It is said, and the official referee has held, that because in respect of three small matters the work was not carried out in [569] accordance with the specification the plaintiffs are not entitled to recover any part of the contract price. The work was in my opinion substantially completed, and the defendant has had the benefit of it, for she has been living in the house ever since the repairs were finished. But it is contended that the authorities compel us to hold, that the defendant, who has got the benefit of all the work that was done, is not liable to pay anything for it because in those respects the contract has not been absolutely complied with. If

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that were the law we should be bound to follow it, however much one might regret having to do so, for I think it would be productive of very great injustice.

It seems to me, however, from the authorities, that where a building or repairing contract has been substantially completed, although not absolutely, the person who gets the benefit of the work which has been done under the contract must pay for that benefit. On the other hand, if the builder has refused to complete his work, or if the work done is of no use to the other party, or if the work is something entirely different from what was contracted for, then the builder can recover nothing. In the present case the work was in my opinion, as I have said, substantially completed. It was not entirely different from what had been contracted for, and it was certainly of use to the defendant, as is shown by the fact that, as appears from the correspondence, she was willing to pay 250*l.* for it.

The first case to which I wish to refer, and which I take as the foundation of my judgment, is *Farnsworth v. Garrard* (1807) 1 Campb. 38. In that case Lord Ellenborough stated what in his opinion was the proper course to be pursued in cases similar to the present. He said: "This action is founded on a claim for meritorious service." The claim was for work and labor done and materials found, with the common counts. "The plaintiff is to recover what he deserves. It is therefore to be considered how much he deserves, or if he deserves anything. If the defendant has derived no benefit from his services, he deserves nothing, and there must be a verdict against him. There was formerly considerable doubt upon this point. The late Buller, J., thought (and I, in deference to so great an authority, have at times ruled the same way) that in cases of this [570] kind, a cross action for the negligence was necessary, but that if the work be done, the plaintiff must recover for it." There was no suggestion that the plaintiff was to recover nothing; the suggestion was that Buller, J., thought that the plaintiff should recover the whole amount, leaving the defendant to sue him in an action for negligence. But Lord Ellenborough adopted what seems to me a more just rule, for he went on to say: "I have since had a conference with the judges on the subject; and I now consider this as the correct
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rule, that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be coextensive with the benefit." That is, I believe, the general rule which has been accepted ever since. There has been one decision, to which I will refer, which seems to be otherwise, but which has, I think, been altered by subsequent decisions, and with that exception all the cases seem to carry out the same point of view. It is not correct to say that there must be evidence of another contract to pay for the work as done; there is not a word about another contract in the judgment of Lord Ellenborough when laying down the principle in *Farnsworth v. Garrard*, *supra*, and I do not think any authority for that suggestion can be found. The principle is that the builder is to recover what he deserves for the work which he has done. If any question of a new contract arises at all, it is because it is to be implied from the fact that the owner of the building has had the benefit of the work or has expressed his willingness to pay for it.

I pass now to the case of *Thornton v. Place*, 1 Moody & R. 218, 219, which was decided in 1832; that is, twenty-five years after *Farnsworth v. Garrard*. In that case there was a contract to do certain work for a lump sum. The action was brought to recover a balance of account. Parke, J., in charging the jury, said: "When a party engages to do certain work on certain specified terms, and in a certain specified manner,—but, in fact, does not perform the work so as to correspond with the specification,—he is not, of course, entitled to recover the price agreed upon in the specification; nor can he recover according to the actual value of the [571] work, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work, so as to make it correspond with the specification." That is a rider upon *Farnsworth v. Garrard*, I think, in this sense, that where there is a contract to do the work for a fixed sum you are not simply to measure and value the work actually done; the proper course is

to deduct from the contract price the cost of the work which has not been done.

The next case to which I wish to refer is *Ellis v. Hamlen* (1810) 3 Taunt. 52, 53, 128 Eng. Reprint, 21, 12 Revised Rep. 595, and it is the case which I have already mentioned as not being consistent with *Farnsworth v. Garrard*. It is also contrary to *Thornton v. Place*, *supra*, but as it was decided more than twenty years before *Thornton v. Place*, it must have been within the knowledge of the learned judge who tried that case. In *Ellis v. Hamlen*, *supra*, an action was brought by a builder, who had contracted to build a house of certain specified materials and dimensions, to recover the balance of the agreed price. It appeared in the course of the trial that the plaintiff had omitted to supply certain joists and other materials of the stipulated description and measurement. The report states that "the counsel for the plaintiff proceeded to inquire of the witnesses what additional sum must be expended on the house to make it equal in value to that which was specified in the contract, contending that the plaintiff was entitled to recover in this action the whole sum which was specified in the contract, excepting thereout the amount of this difference in value, which, they said, would be the measure of damages, if an action had been brought on the contract by the employer against the builder for not performing his contract; and that if the sums which had already been paid to the plaintiff on account did not amount to the whole price specified in the contract, deducting therefrom the amount of the before-mentioned difference in value, the plaintiff was entitled to a verdict for the residue minus that difference. Mansfield, C.J., was of opinion that the plaintiff, not having performed the agreement he had proved, must be nonsuited. The [572] plaintiff's counsel then resorted to a count which they found in the declaration, for work, labor, and materials, upon a *quantum valebant*, and said that the plaintiff" (this is obviously a mistake for defendant), "having the benefit of the houses, was bound at least to pay for them according to their value," but Mansfield, C.J., held that the plaintiff was not entitled to recover under that head of his claim. It does not appear that the difference between the count for work and labor and the count on the special agreement

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for a sum fixed was referred to, nor was there any discussion as to whether it would make a difference if the work was substantially completed. The decision was that a plaintiff in a case of that sort cannot recover anything unless he shows that the contract has been completely performed. I am unable to follow that case, because it seems to me not to be in accordance with the other decisions. The next case to which I wish to refer is *Cutler v. Close*, 5 Car. & P. 337, 338, decided in 1832, and therefore twenty-two years after *Ellis v. Hamlen* (1810) 3 Taunt. 52, 128 Eng. Reprint, 21, 12 Revised Rep. 595, and in the same year as *Thornton v. Place* (1832) 1 Moody & R. 218. It was an action to recover 70*l.* on a contract for providing and erecting a warm-air stove and apparatus in a chapel. On the part of the defendant it was said that the work had been executed in an imperfect manner, and that it could not be said to have been completed in such a way as to satisfy the trustees of the chapel. It was argued for the plaintiffs that if the work had been done improperly the defendant might bring a cross action against the plaintiffs; but that if he had derived any advantage from it he must pay the price. That is exactly the contrary of what had been said in *Ellis v. Hamlen*, *supra*. Tindal, C.J., in summing up to the jury in *Cutler v. Close*, *supra*, said: "The law on the subject, as it seems to me, lies in a narrow compass. If the stove in question is altogether incompetent and unfit for the purpose, and, either from that or from the situation in which it is placed, does not at all answer the end for which it was intended, then the defendant is not bound to pay. If it is perfect, and the fault lies in mismanagement at the chapel, then the plaintiffs will be entitled to recover the whole price. But there is another view of the case. The apparatus may be in the main substantial, but not quite so complete as it might be according to the contract; and, [573] in that case, if it can be made good at a reasonable expense, the proper course will be to give your verdict for the plaintiffs, deducting such sum as will enable the defendant to do that which is requisite to make it complete." That exposition of the law appears to me to be exactly applicable to this case.

Stegmann v. O'Connor (1899) 80 L. T. N. S. 234, was a case
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in which a decision of Bruce, J., and myself, was affirmed by the Court of Appeal. (1900) 81 L. T. N. S. 627. It is an instance of a case in which the work was entirely useless, and therefore we held that nothing was recoverable. In view of the argument which has been addressed to us by counsel for the defendant I also refer to *Lucas v. Godwin* (1837) 3 Bing. N. C. 737, 743, 132 Eng. Reprint, 595, 4 Scott, 402, 3 Hodges, 114, 6 L. J. C. P. N. S. 205, which is important as showing that Tindal, C.J., adhered to the view which he had expressed in *Cutler v. Close*, *supra*. It was a case in which the contract had not been completely performed. Tindal, C.J., said: "I think the plaintiff was entitled to sue on the general counts. In all such cases a plaintiff is entitled to do so unless there be something express and explicit in the contract to show a condition which goes to the whole right of action. I see none such here. If it be said that the condition that the work shall be done in a proper and workmanlike manner, is of that nature, that is a condition which is implied in every contract of the same kind; and if it were a condition precedent to the plaintiff's remuneration, a little deficiency of any sort would put an end to the contract, and deprive a plaintiff of any claim for payment; but under such circumstances, it has always been held that where the contract has been executed, a jury may say what the plaintiff really deserves to have." I think that applies to this case because this contract has also been executed.

I have now, I think, expressed sufficiently my view of the law applicable to this case. I understand that counsel for the defendant contend that it was for the official referee to say whether or no the contract had been substantially executed in this case. I think otherwise. I think there was no evidence on which he was entitled to find in this case that it had not been executed. In my opinion the contract had been executed within the meaning that has been given to those words in the previous decisions, although there were some few small details or matters which required to be put right.

[574] The case of *Forman & Co. Proprietary v. Ship Liddesdale* [1900] A. C. 190, 69 L. J. Prob. N. S. 44, 82 L. T. N. S. 331, 9 Asp. Mar. L. Cas. 45, which was relied on by counsel for
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the defendant, seems to me to be of quite a different nature. The repairs to the ship had been so done as to entirely alter the original character of the ship, and the case therefore falls within one of the categories in respect of which the action would not be allowed to be maintained. I think I ought to add with regard to *Appleby v. Myers* (1867) L. R. 2 C. P. 651, 36 L. J. C. P. N. S. 331, 16 L. T. N. S. 669, which was a case upon a different state of facts altogether, that I think the statement made by Blackburn, J., in that case, which is relied upon by the defendant in this case, although I should not think of questioning it for a single moment, was not intended to be an exclusive and complete statement of the law relating to claims under contracts which have been practically, although not completely, performed. In my opinion it is not correct to say that there must always be a new contract in order to render the building owner liable in such a case.

For these reasons I think this decision must be reversed, and, as the value of the work has been found by the learned referee, I think it would be better to adopt his figure in order to avoid the necessity for a new trial.

Sankey, J.: I agree. I do not think that the official referee took the correct view of either the law or the facts. In my opinion the law applicable to cases of this sort is as follows: Where a builder has supplied work and labor for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1) the work that he has done has been of no benefit to the owner; (2) the work he has done is entirely different from the work which he has contracted to do; or (3) he has abandoned the work and left it unfinished.

As to the first case, namely, where the work as done is of no benefit to the owner, the authority is *Farnsworth v. Garrard* (1807) 1 Campb. 38, 10 Revised Rep. 624. An illustration of the second case, where the work done is entirely different from the work which the builder contracted to do, may be found, I think, in the case of *Forman & Co. Proprietary v. Ship* [575] *Liddesdale* [1900] A. C. 190, 201. The gist of the de-
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cision is given where Lord Hobhouse says: "It is also made clear that the substitution of iron for steel not only added to the weight and to the expense, but altered the structure of the vessel—to her advantage, as the plaintiffs contend, but, as the defendant says, causing a rigidity in her framework which is a source of danger to her. That is a matter on which opinions vary; but there is no dispute that the alteration is not consistent with the plaintiffs' obligation to restore the vessel to her original condition prior to the accident."

Another illustration of the same class of case, namely, where the work done is entirely different from the work contracted to be done, may be found in the observations of Day, J., in *London School Board v. Wall* (1890) 2 Hudson, Bldg. Contr. 3d ed. p. 165. A similar rule applies in the sale of goods, where the plaintiff cannot recover if he supplies an article entirely different from that which he has contracted to supply.

With regard to the third case, namely, where the builder has abandoned the work or left the house or the repairs unfinished, the authority is *Sumpter v. Hedges* [1898] 1 Q. B. 673, 67 L. J. Q. B. N. S. 545, 78 L. T. N. S. 378, 46 Week. Rep. 454. There the plaintiff had abandoned the work and left it incomplete. Mr. Cassels in the course of his argument put by way of illustration the case of a builder who, having contracted to build a 10-foot wall, built a wall of 2 feet only, and he contended that in that case the builder could not recover. In my opinion that would come into the third category of cases which I have mentioned; the builder would be held not to have finished the work and to have abandoned it. I do not think it is necessary to go through all the cases on this third point. There is an old case of *Sinclair v. Bowles* (1829) 9 Barn. & C. 92, 109 Eng. Reprint, 35, 4 Ryan & M. 1, 7 L. J. K. B. 178, which is a similar case; there the contract was by the plaintiff to complete a chandelier for a particular sum, and the jury found that the contract had not been performed. Another similar case, though on a different branch of the law, is *Cutter v. Powell* (1795) 6 T. R. 320, 101 Eng. Reprint, 573, 3 Revised Rep. 185, 6 Eng. Rul. Cas. 627, 2 Smith, Lead. Cas. 1, where the deceased man had not performed his contract to act as mate of a vessel on a voyage from Jamaica

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to Liverpool, and it was held that his executor could not recover.

[576] But then it is said that the first contract, not having been performed, has gone, and that there is no evidence of any new contract by the defendant to pay for the work that was actually done. She says that no promise to pay for that work can be implied from the fact that the defendant occupied the house, because the work was carried out on the employer's land, and therefore could not be erected. I think there is a fallacy underlying that argument. I do not think that the contract can be said to have gone where the house has been substantially completed or the repairs have been substantially carried out, though not entirely in the manner provided for by the contract. The true view and the true method of ascertaining the amount due to the plaintiff in such a case is, I think, that given by Parke, B., in the case of *Thornton v. Place* (1832) 1 Moody & R. 218, 219, where he says: "What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work, so as to make it correspond with the specification." Where repairs have been substantially completed, or a house has been substantially erected, in accordance with the contract, I find no difficulty in holding either that the contract has been performed, or that there is an implied request by the defendant to do the work and an implied promise to pay. I cannot hold that, where a builder has done ninety-nine hundredths of the work according to the contract and the remaining one hundredth in a different way, the building owner is not in law obliged to pay for any part of the work done. The present case, in my view, is an example of that. Unfortunately, we have not the advantage of hearing exactly what the learned referee said when he gave his judgment, but I am satisfied that there was no finding by him that the work done by the plaintiffs was of no benefit to the defendant, or that it was entirely different from that which the plaintiffs contracted to do, and there is no finding that they either abandoned the work or left the repairs unfinished. I do not think there is any evidence—certainly our attention has not been drawn to it—to show that the contract has not been substantially completed, and I do not think that because there was a

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slight variation in the depth of the concrete, a very insignificant variation in the columns, and a still more insignificant [577] variation in the beams by their not being cleated, it is possible to say that the repairs have not been substantially done.

Under these circumstances, I think the judgment of the learned official referee was wrong, and that this appeal ought to be allowed.

Appeal allowed.

The defendant appealed.

W. E. Hume, Williams, K.C., J. D. Cassels, and B. L. A. O'Malley, for the appellant, made use of the same arguments as in the court below, and referred to the same authorities. They did not dispute the law laid down by the Divisional Court, but the application of it.

Bromley Eames, for the respondents, was not called upon to argue.

Lord Cozens-Hardy, M.R.: This is an appeal from a decision of the Divisional Court reversing the finding of the official referee in a dispute between builders and a building owner. The building owner was a lady who was engaged in school work, and whose house required certain alterations and improvements.

A specification was prepared in August, 1913, by which the builders agreed to do a great deal. They were to examine the roof and renew the decayed parts of it and the gutter pipes, to repair the gutters and rainwater pipes in the roof over the conservatory, to examine the main roof, to underpin, where necessary, the piers and walls of the conservatory, and rebuild any portions where found necessary, to repair or renew the wood staircase, to take down the bay window and rebuild it, to reconstruct the arches over the first and second floor windows, to alter the porch roof, to repair the basement area window, to cut out the cracks in the flank wall, to excavate as required and underpin the flank wall and chimney breasts with solid Portland cement concrete base, the concrete underpinning to be composed of one part
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of Portland cement concrete to six parts of clean Thames ballast, to test and examine the drains, to take down the brick arches in the back elevation, to alter the front gate, and to do a number of other things. It will be observed [578] that one of the matters which is mentioned more than once is the underpinning of a wall which was to be done with solid Portland cement concrete base. The work was finished—and when I say this I do not wish to prejudice matters, but I cannot think of a better word to use at the moment.

There were then disputes, as I have said, between the building owner and the builders. An action was commenced by the builders and referred to the official referee, and the official referee heard arguments extending over some seven or eight days, and he went twice to look at the house. He has made a finding to the effect that the obligation on the plaintiffs was to put down concrete 4 feet in depth throughout the part to be underpinned; I am not quite sure whether that is true. There is, in the specification itself, no clause binding them to put concrete to the depth of 4 feet. It is true that, in the letter of even date which inclosed the estimate for doing the work comprised in the specification, it is said that the estimate was on the basis of concrete being 4 feet deep; but there is not an express contract that the concrete should be of that depth. However, the official referee has found that the plaintiffs were under the obligation to put down 4 feet of concrete, and the builders swore at the trial that 4 feet of concrete had in fact been put in. The official referee went to the house on two occasions and tested it, and he has found as a fact “that in no parts was there the contract depth; 1 foot 7 inches to 2 feet was the average depth.” He also said: “It is immaterial that the plaintiffs considered and that the defendant considered the depth to be safe.” He has also found that the builders put in two solid columns 4 inches in diameter when, according to the specification, they were to be 5 inches in diameter, hollow; but that is a trivial matter, and so trivial that I do not propose to say another word about it. He then says that certain rolled steel joists ought to have been bolted to caps and to each other, and that this was quite ignored. That may or may not have been a matter

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of importance. Lastly, he finds that the concrete was not properly mixed.

In these circumstances it has been argued before us that, in a contract of this kind to do work for a lump sum, the defect in some of the items in the specification, or the failure to do every item contained in the specification, puts an end to the whole contract, [579] and prevents the builders from making any claim upon it; and therefore, where there is no ground for presuming any fresh contract, he cannot obtain any payment. The matter has been treated in the argument as though the omission to do every item perfectly was an abandonment of the contract. That seems to me, with great respect, to be absolutely and entirely wrong. An illustration of the abandonment of a contract which was given from one of the authorities was that of a builder who, when he had half finished his work, said to the employer "I cannot finish it, because I have no money," and left the job undone at that stage. That is an abandonment of the contract, and prevents the builder, therefore, from making any claim, unless there be some other circumstances leading to a different conclusion. But to say that a builder cannot recover from a building owner merely because some item of the work has been done negligently or inefficiently or improperly is a proposition which I should not listen to unless compelled by a decision of the House of Lords. Take a contract for a lump sum to decorate a house; the contract provides that there shall be three coats of oil paint, but in one of the rooms only two coats of paint are put on. Can anybody seriously say that under these circumstances the building owner could go and occupy the house and take the benefit of all the decorations which had been done in the other rooms without paying a penny for all the work done by the builder, just because only two coats of paint had been put on in one room where there ought to have been three?

I regard the present case as one of negligence and bad workmanship, and not as a case where there has been an omission of any one of the items in the specification. The builders thought apparently, or so they have sworn, that they had done all that was intended to be done in reference to the contract; and I suppose the defects are due to carelessness on the part of some of the

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workmen or of the foreman: but the existence of these defects does not amount to a refusal by them to perform part of the contract; it simply shows negligence in the way in which they have done the work. Thus, in regard to the rolled steel joists, they have not apparently bolted them together in some particular way, the precise nature of which I confess I do not understand.

Then what is the result? It seems to me that the result is that [580] the builders are entitled to recover the contract price, less so much as it is found ought to be allowed in respect of the items which the official referee has found to be defective. There is no finding by the referee as to what the precise figures should be, and, unless they are agreed, the matter must go back to him to decide what ought to be allowed in respect of the concrete not being 4 feet and the wrong joining of the rolled steel joists, and what, if anything, ought to be allowed in respect of the concrete not having been properly mixed.

The appeal substantially fails and must be dismissed; but the case must go back, if necessary, to the official referee to find what allowance ought to be made from the sum to be paid the builders in respect of those items. The appellant must pay the costs of this appeal.

Pickford, L.J.: I agree. We have been told that if we affirm this judgment we shall be upsetting all the cases which have ever been decided in regard to contracts made for payment of a lump sum. To my mind our decision does not interfere with any one of them. Certainly I have not the slightest wish to differ from the view that if a man agrees to do a certain amount of work for a lump sum, and only does part of it, he cannot sue for the lump sum; but I cannot accept the proposition that if a man agrees to do a certain amount of work for a lump sum every breach which he makes of that contract by doing his work badly, or by omitting some small portion of it, is an abandonment of his contract, or is only a performance of part of his contract, so that he cannot be paid his lump sum. It seems to me that there would be a performance of the contract, although some part of it was done badly, and that seems to me to be the position here.

Here then was a contract to do a considerable amount of work
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to the defendant's house for the price of 264*l*. I do not understand whether the official referee's finding about the columns was a serious matter or a mere matter of detail; but the matters with which we are mainly concerned here are the concrete work in the underpinning of the side elevation, and the rolled steel joists, which are part of the work on the front elevation. According to a calculation made by the plaintiffs before they sent in their estimate the [581] costs of these items were estimated, so far as the concreting went, at 60*l*., and as regards the other item at 70*l*., so that, although they were a substantial part of the work in the specification, they were not by any means the whole of the work which had to be done under it. The official referee has found, with regard to the rolled steel joists, that they were "to be side by side, cleated at angles and bolted to caps and to each other." The plaintiffs have put in the rolled steel joists, but they have failed to bolt them together. Can it be said that this amounts to performing only a part of the contract in the sense that the contract was not finished, and therefore that the plaintiffs cannot claim any part of the lump sum at all? That would be to go beyond any case that has ever been decided, as far as I know. The other matter is in connection with the underpinning. This part of the specification is as follows: "Excavate as required and underpin the flank wall and chimney breasts with solid Portland cement concrete base. Properly level the bottom of excavations before filling in concrete," and so on. It will be noticed that in the specification no special depth of cement is mentioned; it is to be done "as required;" but in the letter which accompanied the specification the plaintiffs said that they had taken it at 4 feet. In another part of the specification I find, under the heading of "Front Elevation:" "Take down the retaining wall to the front area between the existing columns. Excavate and form new Portland cement concrete foundation for same to a depth of 1 foot 6 inches below the floor of area and for a width of 2 feet." There provision is made for a specific depth, but in the other case there was not. I take it, however, that it was to be 4 feet deep. The position as to that is that the plaintiffs have done that work wrongly. They have excavated and underpinned, but they have not put in concrete of a depth of 4 feet, which, as I take it, they

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had contracted to do. I am not expressing any opinion as to whether what they have done is sufficient; it may or may not be; but I will assume that they had contracted to put in 4 feet of concrete, but have failed to do it. The official referee also says that they have not put in cement which is properly mixed. There is nothing in all this that seems to me to amount to doing only a part of the work contracted for and abandoning the rest. What the plaintiffs have done is to perform the work which they had contracted to do, but [582] they have done some part of it insufficiently and badly; and that does not disentitle them to be paid, but it does entitle the defendant to deduct such an amount as is sufficient to put that insufficiently done work into the condition in which it ought to have been according to the contract.

That seems to me to be the position here, and therefore the decision of the Divisional Court was right, but with this exception: they arrived at the deductions to be made from the contract price in a way to which the parties did not agree, and by some rule of thumb method that cannot, I think, be supported unless both parties agree. Of course the defendant may wish to appeal to the House of Lords; but if not, I think the parties would be very foolish if they did not agree these figures. I am sure that they can be quite easily agreed. If, however, the parties do not agree them, the case must go back to the official referee in order that it may be ascertained what is the expenditure necessary, first, to put this underpinning right and make it accord with the contract both in regard to quality and quantity; and, secondly, to do the work which ought to have been done with regard to bolting together the rolled steel joists. It is not intended that there should be another roving inquiry over the whole contract.

Warrington, L.J.: I agree, and I have nothing to add.

Appeal dismissed.

Solicitors for plaintiffs: *Kimber Bull & Duncan.*

Solicitors for defendant: *Colyer & Colyer.*

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Note.—Recovery on building contract substantially performed.**I. Scope, 718.****II. In general, 718.****III. What constitutes substantial performance:****a. In general, 735.****b. In particular instances, 740.****c. When question for jury, 760.****IV. Measure of recovery, 763.****I. Scope.**

The cases reviewed in this note are those relating to the construction of buildings or some appurtenance thereof, such as heating plants, sidewalks, elevators, or other machinery which loses its chattel character and becomes a component part of the structure in which it is installed. This involves the exclusion (with some exceptions) of cases involving the question of recovery on substantial performance of construction contracts for the doing of some sort of work upon land, other than the construction, improvement, or repair of some edifice thereon, and of cases involving contracts relating to chattels.

The note is concerned solely with the scope and application of the doctrine of substantial performance in its relation to building contracts, and does not undertake to discuss other questions which may affect the right of recovery on a building contract not literally and fully performed, such as the effect of acceptance of the defective work, or the effect of the failure of the owner or his representative to notify the contractor of his failure to comply with the terms of the contract.

II. In general.

The reported case (*H. DAKIN & Co. v. LEE*, *ante*, 700) is of interest not only for its clear-cut summary of the law in regard to the right to recover on building contracts, but also because it sets at rest any doubt that may have existed (see *Sherlock v. Powell* (1899) 26 Ont. App. Rep. 407) as to the adoption of the doctrine of substantial performance by the English courts.¹

¹ Another instance in which the English courts have permitted recovery in case of substantial performance is *Culler v. Close* (1832) 5 Car. & P. 337.

On the other hand, in *Ellis v. Hamlen* (1810) 3 Taunt. 52, 128 Eng. Reprint, 21, 12 Revised Rep. 595, an action brought by a builder against his employer for building a house of specified dimensions 10 B. R. C.

The American courts, while sometimes permitting recovery on the contract, sometimes on a *quantum meruit* not exceeding the contract price, and sometimes on a *quantum meruit* on a basis of *quantum valebat*, are in effect united in holding that a substantial performance of a building contract will support a recovery.⁸

sions, to recover the balance due under the contract, where the defense was that the plaintiff had omitted to put in the building certain joists and other materials of given description and measure, Mansfield, Ch. J., was of the opinion that the plaintiff, never having performed the agreement, must be nonsuited. He said: "The defendant agrees to have a building of such and such dimensions; is he to have his ground covered with buildings of no use, which he would be glad to see removed, and is he to be forced to pay for them besides? It is said, he has the benefit of the houses and therefore the plaintiff is entitled to recover on a *quantum valebant*. To be sure, it is hard that he should build houses, and not be paid for them; but the difficulty is, to know where to draw the line; for if the defendant is obliged to pay in a case where there is one deviation from his contract, he may equally be obliged to pay for anything, how far soever distant from what the contract stipulated for."

⁸ CANADA.—*Canadian Western Foundry & Supply Co. v. Hoover* (1917) 13 Alberta L. R. 347, [1917] 3 West Week. Rep. 594, 37 D. L. R. 285; *Fisher v. Cox* (1921) 54 N. S. 226, 57 D. L. R. 567; *Diebel v. Stratford Improv. Co.* (1917) 38 Ont. L. Rep. 407, 33 D. L. R. 296; *Taylor Hardware Co. v. Hunt* (1917) 39 Ont. L. Rep. 85, 35 D. L. R. 504; *House Repair & Service Co. v. Miller* (1921) — Ont. —, 64 D. L. R. 115.

UNITED STATES.—*Swain v. Seamens* (1870) 9 Wall. 254, 19 L. ed. 554; *Pitcairn v. Philip Hess Co.* (1902) 51 C. C. A. 323, 113 Fed. 492; *Elizabeth v. Fitzgerald* (1902) 52 C. C. A. 321, 114 Fed. 547; *Caldwell v. Schmulbach* (1909) 175 Fed. 429, modified by circuit court of appeals on other grounds in (1912) 115 C. C. A. 650, 196 Fed. 16; *Walsh Constr. Co. v. Cleveland* (1920) 271 Fed. 701.

ALABAMA.—*Walstrom v. Oliver-Watts Constr. Co.* (1909) 161 Ala. 608, 50 So. 46; *R. D. Burnett Cigar Co. v. Art Wall Paper Co.* (1909) 164 Ala. 547, 51 So. 263.

ARKANSAS.—*Fitzgerald v. La Porte* (1897) 64 Ark. 34, 40 S. W. 261; *Mitchell v. Caplinger* (1911) 97 Ark. 278, 133 S. W. 1032; *Thomas v. Jackson* (1912) 105 Ark. 353, 151 S. W. 521; *Roseburr v. McDaniel* (1921) — Ark. —, 227 S. W. 397; *Wilmot v. West* (1921) — Ark. —, 228 S. W. 735.

CALIFORNIA.—*Harlan v. Stufflebeem* (1891) 87 Cal. 508, 25 Pac. 686; *Clark v. Collier* (1893) 100 Cal. 256, 31 Pac. 677; *Marchant v. Hayes* (1897) 117 Cal. 669, 49 Pac. 840; *Schindler v. Green* (1906) 149 Cal. 752, 87 Pac. 626; *Jones & L. Steel Co. v. Abner Doble Co.* (1912) 162 Cal. 497, 123 Pac. 290; *Connell v. Higgins* (1915) 170 Cal. 541, 150 Pac. 769; *Smith v. Mathews Constr. Co.* 10 B. R. C.

(1919) 179 Cal. 797, 179 Pac. 205; *Rischard v. Miller* (1920) 182 Cal. 351, 188 Pac. 50; *Collins v. Ramish* (1920) 182 Cal. 360, 188 Pac. 550; *Thomas Harvarty Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105; *Seebach v. Kuhn* (1909) 9 Cal. App. 485, 99 Pac. 723; *Watson v. Alta Invest. Co.* (1910) 12 Cal. App. 560, 108 Pac. 48; *Giberson v. Fink* (1915) 28 Cal. App. 25, 151 Pac. 371; *Joseph Musto Sons-Keenan Co. v. Pacific States Corp.* (1920) — Cal. App. —, 192 Pac. 138; *Conrad v. Foerst* (1921) — Cal. App. —, 201 Pac. 795; *Hallenleben v. Heine Piano Co.* (1921) — Cal. App. —, 201 Pac. 942.

COLORADO.—*Louthan v. Carson* (1917) 63 Colo. 473, 168 Pac. 656; *Stewart v. Breckenridge* (1917) — Colo. —, 169 Pac. 543; *Morris v. Hikosona* (1914) 26 Colo. App. 251, 143 Pac. 826.

CONNECTICUT.—*Smith v. Scott's Ridge School Dist.* (1850) 20 Conn. 312; *Pinches v. Swedish E. L. Church* (1887) 55 Conn. 183, 10 Atl. 264; *Healy v. Fallon* (1897) 69 Conn. 228, 37 Atl. 495; *Jones & H. Co. v. Davenport* (1902) 74 Conn. 418, 50 Atl. 1028; *McCrehouse v. Bradley* (1908) 80 Conn. 611, 69 Atl. 937; *Chariott v. McMullen* (1911) 84 Conn. 702, 81 Atl. 65; *Pratt v. Dunlap* (1912) 85 Conn. 180, 82 Atl. 195; *M. J. Daly & Sons v. New Haven Hotel Co.* (1916) 91 Conn. 280, 99 Atl. 853.

DISTRICT OF COLUMBIA.—*Beha v. Ottenberg* (1887) 6 Mackey, 348.

GEORGIA.—*Small v. Lee* (1908) 4 Ga. App. 395, 61 S. E. 831.

ILLINOIS.—*Fish v. Stubbings* (1872) 65 Ill. 492; *Keeler v. Herr* (1895) 157 Ill. 57, 41 N. E. 750; *Christopher & S. Architectural Iron & Foundry Co. v. Yeager* (1903) 202 Ill. 486, 67 N. E. 166, affirming (1902) 105 Ill. App. 126; *Evans v. Howell* (1904) 211 Ill. 85, 71 N. E. 854, affirming (1903) 111 Ill. App. 167; *Bauer v. Hindley* (1906) 222 Ill. 319, 78 N. E. 626; *Bloomington Hotel Co. v. Garthwait* (1907) 227 Ill. 613, 81 N. E. 714, modifying (1907) 130 Ill. App. 418; *Concord Apartment House Co. v. O'Brien* (1907) 228 Ill. 360, 81 N. E. 1038; *Peterson v. Pusey* (1908) 237 Ill. 204, 86 N. E. 692; *Erikson v. Ward* (1915) 266 Ill. 259, 107 N. E. 593, Ann. Cas. 1916B, 497; *Mason v. Griffith* (1917) 281 Ill. 246, 118 N. E. 18; *School Directors v. Roberson* (1896) 65 Ill. App. 298; *Cook v. American Luxfer Prism Co.* (1901) 93 Ill. App. 299; *Simpson Constr. Co. v. Stenberg* (1906) 124 Ill. App. 322; *Adkins v. Lee* (1907) 138 Ill. App. 8; *Peterson v. Pusey* (1908) 141 Ill. App. 578, affirmed in (1908) 237 Ill. 204, 86 N. E. 692; *Ruddy v. McDonald* (1909) 149 Ill. App. 111, judgment modified in (1910) 244 Ill. 494, 91 N. E. 651; *Kleinschnittger v. Dorsey* (1910) 152 Ill. App. 598; *Krumholz v. Tobias* (1912) 167 Ill. App. 553; *Haentze v. Brown* (1915) 193 Ill. App. 288; *Sundstrom v. Weinrich* (1917) 207 Ill. App. 313.

IOWA.—*Robertson v. King* (1881) 55 Iowa, 725, 8 N. W. 665; *Coen v. Birchard* (1904) 124 Iowa, 394, 100 N. W. 48; *Keys v. Garben* (1910) 149 Iowa, 394, 128 N. W. 337; *Henry v. Jons* (1914) 164 Iowa, 364, 145 N. W. 909; *Stratmeyer v. Hoyt* (1919) — Iowa, —, 174 N. W. 243.

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KANSAS.—*Lofsted v. Bohman* (1913) 88 Kan. 660, 129 Pac. 1168.

KENTUCKY.—*Nance v. Patterson Bldg. Co.* (1910) 140 Ky. 564, 140 Am. St. Rep. 398, 131 S. W. 494; *Vincennes Bridge Co. v. Walker* (1918) 181 Ky. 651, 205 S. W. 778.

LOUISIANA.—*Dugue v. Levy* (1904) 114 La. 21, 37 So. 995.

MAINE.—*Skowhegan Water Co. v. Skowhegan* (1906) 102 Me. 323, 66 Atl. 714.

MASSACHUSETTS.—*Hayward v. Leonard* (1828) 7 Pick. 181, 19 Am. Dec. 269; *Smith v. First Cong. Meeting-house* (1829) 8 Pick. 178; *Gleason v. Smith* (1852) 9 Cush. 484, 57 Am. Dec. 62; *Veazie v. Hosmer* (1858) 11 Gray, 396; *Cullen v. Sears* (1873) 112 Mass. 299; *McCue v. Whitwell* (1892) 156 Mass. 205, 30 N. E. 1134; *Gillis v. Cobe* (1901) 177 Mass. 584, 59 N. E. 455; *Bergfors v. Caron* (1906) 190 Mass. 168, 76 N. E. 655; *Handy v. Bliss* (1910) 204 Mass. 513, 134 Am. St. Rep. 673, 90 N. E. 864; *Lynch v. Culhane* (1922) — Mass. —, 135 N. E. 119.

MICHIGAN.—*Strome v. Lyon* (1896) 110 Mich. 680, 68 N. W. 983.

MINNESOTA.—*Leeds v. Little* (1890) 42 Minn. 414, 44 N. W. 309; *Elliott v. Caldwell* (1890) 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845; *Anderson v. Pringle* (1900) 79 Minn. 433, 82 N. W. 682; *Cornish, C. & G. Co. v. Antrim Co-op. Dairy Asso.* (1901) 82 Minn. 215, 84 N. W. 724; *Hanke v. Arundel Realty Co.* (1906) 98 Minn. 219, 108 N. W. 842; *Hoglund v. Sortedahl* (1907) 101 Minn. 359, 112 N. W. 408; *Snider v. Peters Home Bldg. Co.* (1918) 139 Minn. 413, 167 N. W. 108; *Sampson v. Brince* (1920) 146 Minn. 101, 177 N. W. 933.

MISSOURI.—*Boteler v. Roy* (1890) 40 Mo. App. 234.

MONTANA.—*Franklin v. Schultz* (1899) 23 Mont. 165, 57 Pac. 1037.

NEBRASKA.—*Hahn v. Bonarum* (1906) 76 Neb. 837, 107 N. W. 1001, 109 N. W. 368.

NEW HAMPSHIRE.—*Danforth v. Freeman* (1898) 69 N. H. 466, 43 Atl. 621.

NEW JERSEY.—*Feeney v. Bardsley* (1901) 66 N. J. L. 239, 49 Atl. 443; *Porter Screen Co. v. United Contractors Corp.* (1910) 80 N. J. L. 115, 77 Atl. 473; *Schauffele v. Greenberg* (1912) 82 N. J. L. 343, 82 Atl. 921, affirmed in (1912) 83 N. J. L. 737, 85 Atl. 178.

NEW YORK.—*Glacius v. Black* (1872) 50 N. Y. 145, 10 Am. Rep. 449; *Johnson v. DePeyster* (1872) 50 N. Y. 666; *Phillip v. Gallant* (1875) 62 N. Y. 256; *Woodward v. Fuller* (1880) 80 N. Y. 312; *Heckmann v. Pinkney* (1880) 81 N. Y. 211; *Flaherty v. Miner* (1890) 123 N. Y. 382, 25 N. E. 418, affirming (1889) 15 Daly, 173, 4 N. Y. Supp. 618; *Van Clief v. Van Vechten* (1892) 130 N. Y. 571, 29 N. E. 1017; *Hollister v. Mott* (1892) 132 N. Y. 18, 29 N. E. 1103; *Oberlies v. Bullinger* (1892) 132 N. Y. 598, 30 N. E. 999; *Crouch v. Gutmann* (1892) 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271, affirming (1890) 32 N. Y. S. R. 254, 10 N. Y. 10 B. R. C.

Supp. 275; *Ringle v. Wallis Iron Works* (1896) 149 N. Y. 439, 44 N. E. 175; *Spence v. Ham* (1900) 163 N. Y. 220, 51 L.R.A. 238, 57 N. E. 412; *Easthampton Lumber & Coal Co. v. Worthington* (1906) 186 N. Y. 407, 79 N. E. 323; *Smith v. Gugerty* (1848) 4 Barb. 614; *Sinclair v. Tallmadge* (1861) 35 Barb. 602; *Anderson v. Meislahn* (1883) 12 Daly, 149; *Gustavson v. McGay* (1884) 12 Daly, 423; *Morton v. Harrison* (1885) 20 Jones & S. 305; *Hughes v. Ferguson* (1885) 23 N. Y. Week. Dig. 185; *Smith v. Clark* (1886) 5 N. Y. S. R. 165; *Woolreich v. Fettretch* (1889) 51 Hun, 640, 21 N. Y. S. R. 56, 4 N. Y. Supp. 326; *McMechan v. Baker* (1890) 34 N. Y. S. R. 535, 11 N. Y. Supp. 781; *Rush v. Wagner* (1890) 34 N. Y. S. R. 798, 12 N. Y. Supp. 2; *Valk v. McKeige* (1891) 43 N. Y. S. R. 26, 16 N. Y. Supp. 741; *Nunan v. Doyle* (1892) 28 Jones & S. 377, 18 N. Y. Supp. 192; *Highton v. Dessau* (1892) 46 N. Y. S. R. 922, 19 N. Y. Supp. 395, affirmed in (1893) 139 N. Y. 607, 35 N. E. 203; *Zimmerman v. Jourgensen* (1893) 70 Hun, 222, 24 N. Y. Supp. 170, (affirmed without opinion in (1894) 144 N. Y. 656, 39 N. E. 859); *Monteverde v. Queens County* (1894) 78 Hun, 267, 28 N. Y. Supp. 918; *Murphy v. Stickley Simonds Co.* (1894) 82 Hun, 158, 31 N. Y. Supp. 295, affirmed without opinion in (1897) 152 N. Y. 626, 46 N. E. 1149; *Flannery v. Sahagian* (1894) 83 Hun, 109, 31 N. Y. Supp. 360; *Anderson v. Petereit* (1895) 86 Hun, 600, 33 N. Y. Supp. 741; *Cahill v. Heuser* (1896) 2 App. Div. 292, 37 N. Y. Supp. 736; *D'Andre v. Zimmermann* (1896) 17 Misc. 357, 39 N. Y. Supp. 1086, affirming (1896) 16 Misc. 499, 38 N. Y. Supp. 1121; *MacKnight-Flintic Stone Co. v. New York* (1898) 31 App. Div. 232, 52 N. Y. Supp. 747 (reversed on other grounds in (1899) 160 N. Y. 72, 54 N. E. 661); *D'Amato v. Gentile* (1900) 54 App. Div. 625, 66 N. Y. Supp. 833 (affirmed without opinion in (1903) 173 N. Y. 596, 65 N. E. 1116); *Holl v. Long* (1901) 34 Misc. 1, 68 N. Y. Supp. 522; *Vogel v. Friedman* (1901) 34 Misc. 775, 68 N. Y. Supp. 280; *Mitchell v. Williams* (1903) 80 App. Div. 527, 80 N. Y. Supp. 864; *Nesbit v. Braker* (1905) 104 App. Div. 393, 93 N. Y. Supp. 856; *Otis Elevator Co. v. Dusenbury* (1905) 47 Misc. 450, 95 N. Y. Supp. 959; *Rowe v. Gerry* (1906) 112 App. Div. 358, 98 N. Y. Supp. 380, affirmed in (1907) 188 N. Y. 625, 81 N. E. 1175; *Ramstedt v. Brooker* (1906) 113 App. Div. 45, 98 N. Y. Supp. 1044; *Van Orden v. MacRae* (1907) 121 App. Div. 143, 105 N. Y. Supp. 600, affirmed in (1908) 193 N. Y. 635, 86 N. E. 1134; *Flagg v. Schoenleben* (1903) 108 N. Y. Supp. 1004; *Rochkind v. Jacobson* (1908) 126 App. Div. 357, 110 N. Y. Supp. 583; *Mitchell v. Dunmore Realty Co.* (1908) 126 App. Div. 829, 111 N. Y. Supp. 322; *Pennsylvania Steel Co. v. Susswein* (1909) 132 App. Div. 659, 117 N. Y. Supp. 436; *Fuchs v. Saladino* (1909) 133 App. Div. 710, 118 N. Y. Supp. 172; *Smith v. Russell* (1910) 140 App. Div. 102, 125 N. Y. Supp. 952 (for later appeal not involving the point, see (1911) 144 App. Div. 847, 129 N. Y. Supp. 461, which is affirmed in (1912) 207 N. Y. 644, 100 N. E. 1134); *North American Wall Paper Co. v. Jack-*
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son Constr. Co. (1915) 167 App. Div. 779, 153 N. Y. Supp. 204; *Greenberg v. Lumb* (1911) 129 N. Y. Supp. 182; *Elias v. Coleman* (1912) 137 N. Y. Supp. 883; *Smith v. Hedges* (1915) 89 Misc. 183, 152 N. Y. Supp. 95, judgment affirmed in (1915) 170 App. Div. 349, 155 N. Y. Supp. 934 (*obiter*) which is affirmed without opinion in (1918) 222 N. Y. 701, 119 N. E. 1077; *Asbestos Plastering Co. v. Norcross Bros. Co.* (1915) 153 N. Y. Supp. 681; *Gens v. Tuscany Realty Co.* (1917) 166 N. Y. Supp. 1076; *Jacob & Youngs v. Kent* (1921) 230 N. Y. 239, — A.L.R. —, 129 N. E. 889, affirming (1919) 87 App. Div. 100, 175 N. Y. Supp. 281; *Brainard v. Ten-Eyck* (1917) 102 Misc. 20, 168 N. Y. Supp. 116.

NORTH DAKOTA.—*Anderson v. Todd* (1898) 8 N. D. 158, 77 N. W. 599; *Braseth v. State Bank* (1904) 12 N. D. 486, 98 N. W. 79; *Dinnie v. Lakota Hotel Co.* (1922) — N. D. —, 186 N. W. 248.

OHIO.—*Kane v. Stone Co.* (1883) 39 Ohio St. 1, affirming (1879) 4 Ohio Dec. Reprint. 509; *Ashley v. Henahan* (1897) 56 Ohio St. 559, 47 N. E. 573; *Block-Pollak Iron Co. v. Cincinnati Corrugating Iron Co.* (1900) 10 Ohio S. & G. P. Dec. 51; *Ryan v. Schardt* (1909) 32 Ohio C. C. 445.

OKLAHOMA.—*Mitchell v. Spurrier Lumber Co.* (1912) 31 Okla. 834, 124 Pac. 10; *Wiebener v. Peoples* (1914) 44 Okla. 32, 142 Pac. 1036, Ann. Cas. 1916E, 748; *Robinson v. Beatty* (1919) 75 Okla. 69, 181 Pac. 941; *Kelley v. Hamilton* (1920) 78 Okla. 179, 189 Pac. 535.

OREGON.—*Todd v. Huntington* (1884) 13 Or. 9, 4 Pac. 295; *Gove v. Island City Mercantile & Mill. Co.* (1888) 16 Or. 93, 17 Pac. 740; *Edmunds v. Welling* (1910) 57 Or. 103, 110 Pac. 533; *Pippy v. Winslow* (1912) 62 Or. 219, 125 Pac. 298.

PENNSYLVANIA.—*Chambers v. Jaynes* (1846) 4 Pa. 39; *Truesdale v. Watts* (1849) 12 Pa. 73; *Danville Bridge Co. v. Pomroy* (1850) 15 Pa. 151; *Wade v. Haycock* (1855) 25 Pa. 382; *Sticker v. Overpeck* (1889) 127 Pa. 446, 17 Atl. 1100; *Gallagher v. Sharpless* (1890) 134 Pa. 134, 19 Atl. 491; *White v. Braddock School Dist.* (1893) 159 Pa. 201, 28 Atl. 136; *Pressy v. McCormack* (1912) 235 Pa. 443, 84 Atl. 427; *Smith v. Cunningham Piano Co.* (1913) 239 Pa. 496, 86 Atl. 1067; *Otis Elevator Co. v. Flanders Realty Co.* (1914) 244 Pa. 186, 90 Atl. 624; *Snedaker v. Torpey* (1909) 41 Pa. Super. Ct. 312; *Smyers v. Zmitrovitch* (1913) 55 Pa. Super. Ct. 440; *Beyer v. Mountz* (1915) 60 Pa. Super. Ct. 22; *Standard Constr. Co. v. Quaker City Cracker Co.* (1920) 73 Pa. Super. Ct. 402.

SOUTH CAROLINA.—*Killian v. Herndon* (1851) 38 S. C. L. (4 Rich.) 609; *Harwood v. Tappan* (1844) 27 S. C. L. (2 Speers) 536.

SOUTH DAKOTA.—*Aldrich v. Wilmarth* (1893) 3 S. D. 523, 54 N. W. 811, rehearing denied in (1893) 3 S. D. 530, 54 N. W. 813; *Hulst v. Benevolent Hall Asso.* (1896) 9 S. D. 144, 68 N. W. 200; *Burgi v. Rudgers* (1906) 20 S. D. 646, 108 N. W. 253.

TEXAS.—*Linch v. Paris Lumber & Grain Elevator Co.* (1890) 80 Tex. 23, 15 S. W. 208; *Bradford v. Whitcomb* (1895) 11 Tex. 10 B. R. C.

The rule is said in *M. J. Daley & Son v. New Haven Hotel Co.* (1916) 91 Conn. 280, 99 Atl. 853, to be an exception to that governing contracts generally, and to have had its origin in considerations of equity and justice.

Three reasons have been given for the rule that substantial performance of a building contract will support a recovery. The first is, that the work on a building is such that, even if rejected, the owner of the land must receive the benefit of the contractor's labor and materials, which is not the case where a chattel is constructed, as the chattel may be returned. Since the owner must receive the fruits of the builder's labor, it is deemed equitable to require the former to pay for what he gets.³

Civ. App. 221, 32 S. W. 571; *Jennings v. Willer* (1895) — Tex. Civ. App. —, 32 S. W. 24; *Graves v. Allert* (1912) — Tex. Civ. App. —, 128 S. W. 940, judgment affirmed in (1911) 104 Tex. 614, 39 L.R.A.(N.S.) 591, 142 S. W. 869; *Stude v. Koehler* (1911) — Tex. Civ. App. —, 138 S. W. 193.

UTAH.—*Foulger v. McGrath* (1908) 34 Utah, 86, 95 Pac. 1004; *Stephens v. Dorey* (1921) — Utah, —, 198 Pac. 261.

VERMONT.—*Kelly v. Bradford* (1860) 33 Vt. 35.

WASHINGTON.—*Windham v. Independent Teleph. Co.* (1904) 35 Wash. 166, 76 Pac. 936; *Mortimer v. Dirks* (1910) 57 Wash. 402, 107 Pac. 184; *McAdam v. Russell* (1910) 61 Wash. 176, 112 Pac. 345.

WISCONSIN.—*Manthey v. Stock* (1907) 133 Wis. 107, 113 N. W. 443; *Foeller v. Heintz* (1908) 137 Wis. 169, 24 L.R.A.(N.S.) 327, 118 N. W. 543; *Toepfer v. Sterr* (1914) 156 Wis. 226, 145 N. W. 970; *Burmeister v. Wolfgram* (1921) — Wis. —, 185 N. W. 517.

WYOMING.—*Finley v. Pew* (1922) — Wyo. —, 205 Pac. 310, rehearing denied in (1922) — Wyo. —, 206 Pac. 148.

But in *Hill v. School Dist.* (1840) 17 Me. 316, an action on a contract to build a school in a particular manner, it was held that a substantial compliance was not sufficient. The court said the question was not as to the perfection of the work, but as to whether it had been done agreeably to the contract.

³ See *Small v. Lee* (1908) 4 Ga. App. 395, 61 S. E. 831; *Stratmeyer v. Hoyt* (1919) 189 Iowa, 85, 174 N. W. 243; *Hayward v. Leonard* (1828) 7 Pick. 181, 19 Am. Dec. 269; *Smith v. First Cong. Meeting-house* (1829) 8 Pick. 178; *Hoglund v. Sortedahl* (1907) 101 Minn. 359, 112 N. W. 408; *Danforth v. Freeman* (1898) 69 N. H. 466, 43 Atl. 621; *Jacob & Youngs v. Kent* (1921) 230 N. Y. 239, — A.L.R. —, 129 N. E. 889; *Spence v. Ham* (1898) 27 App. Div. 379, 50 N. Y. Supp. 960, affirmed in (1900) 163 N. Y. 220, 51 L.R.A. 238, 57 N. E. 412; *Mitchell v. Dunmore Realty Co.* (1908) 126 App. Div. 829, 111 N. Y. Supp. 322; *Danville Bridge Co. v. Pomroy* (1850) 15 Pa. 151; *Stude v. Koehler* (1911) — Tex. Civ. App. —, 138 S. W. 193.

In *Foeller v. Heintz* (1908) 137 Wis. 169, 24 L.R.A.(N.S.) 327, 10 B. R. C.

The second reason is, that it is next to impossible for a builder to comply literally with all the minute specifications in a building contract.⁴

118 N. W. 543, it is said: "The right to recover for part performance of an entire building contract is widely distinguishable from such right generally. The exception is purely of judicial creation, having in view the inequity of permitting a person to suffer great loss to the enrichment of another, in a situation where, in the very nature of things, no opportunity exists for the former, practically and reasonably, to restore the latter to his former position, as in case of one constructing a building upon the premises of another which that other must necessarily receive because of its being incorporated into and an inseparable part of his property."

In *Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105, it is said: "It is worthy of remark that this relaxation of the rigid rule of the common law is, after all, little more than a change from form to substance in the administration of justice. At common law, where a person failed to strictly perform a building contract, if the work actually done benefited the owner and to some extent served his purpose, the contractor could recover the reasonable value of the work done, in an action in quantum meruit, and the owner could recoup the damage he had sustained from the breach of the contract to fully perform. But if the contractor, believing he had fully performed, sued on the contract for the agreed price, the action, under the rigid rules as to forms of action, would be defeated upon a showing by the owner that there had been a failure to perform the contract in the least material particular. Forms of action are now abolished, and one of the main reasons for adherence to the rigid rule of the common law is thereby removed. Since the contractor would, in justice, be entitled to recover the reasonable value of the work done, not exceeding the contract price, no good reason now appears why, in a suit upon the contract for the price, he should not be allowed to recover the price, less the reasonable compensation to the owner for any damages arising from a failure to completely perform, provided the contractor has acted in good faith, and the article or building is so far completed that it reasonably serves the purpose for which it was intended by the owner. Substantial justice is provided by this course of procedure, and no real property right is violated."

⁴ See *Leeds v. Little* (1890) 42 Minn. 414, 44 N. W. 309; *Glacius v. Black* (1872) 50 N. Y. 145, 10 Am. Rep. 449; *Smith v. Gugerty* (1848) 4 Barb. 614; *Anderson v. Petereit* (1895) 86 Hun. 600, 33 N. Y. Supp. 741; *Stude v. Koehler* (1911) — Tex. Civ. App. —, 138 S. W. 193.

In *Anderson v. Petereit* (1895) 86 Hun. 600, 33 N. Y. Supp. 741, it is said that the relaxation of the rule was not intended to permit courts and juries to substitute a money indemnity as an equitable compensation for unfulfilled covenants of the contract, but arose be-
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The third reason is that the parties are presumed to have impliedly agreed to do what is reasonable under all the circumstances, with reference to the subject of performance.⁵

The owner, it is said, is secured substantial justice if he takes the building as it is, constructed in reasonable conformity with the plans and specifications, and is awarded damages for the decrease in its value due to the failure absolutely to perform the contract requirements, and that it would be intolerable injustice to allow him to retain without pay what the contractor had done for his benefit.⁶

The doctrine of substantial performance does not, however, apply when the variations from the terms of the contract are so substantial that an allowance out of the contract price of damages for the devi-

cause of the difficulty of complying with entire exactness with all the particulars embodied in that class of agreements.

But in *Smith v. Scott's Ridge School Dist.* (1850) 20 Conn. 312, the court declares that if it were said that it was very difficult for a builder literally to comply with all the minute specifications of the building contract, the answer was that the difficulty, if there were one, the builder took into consideration when he made his contract; and if it were such that he could not comply with it, it was his folly to enter into the agreement. It was said that there was no difference in regard to the duty of performance arising from the fact of an agreement being a building contract, that contracts of this description were as binding as any other, and that where a builder's compensation was made dependent on its performance it was both just and legal that his nonperformance should deprive him of it. Good faith requires the performance of all contracts. But in the same case, the doctrine of substantial performance was upheld.

⁵ In *Spence v. Ham* (1900) 163 N. Y. 220, 51 L.R.A. 238, 57 N. E. 412, the court said that when the omission is slight and unintentional, in order to prevent the hardship of a failure to recover even for that which was well done, compensation is substituted *pro tanto* for performance, and that this rule is adopted upon the theory that the parties are presumed to have impliedly agreed to do what is reasonable under all the circumstances with reference to the subject of performance.

⁶ *Hoglund v. Sortedahl* (1907) 101 Minn. 359, 112 N. W. 408.

The theory upon which a contractor is allowed to recover when the work has been substantially performed, notwithstanding there may be some trivial imperfections, seems to be that the owner receives the benefit of the work of the contractor and can be protected by an allowance of damages for trivial omissions or imperfections. *Watson v. Alta Invest. Co.* (1910) 12 Cal. App. 560, 108 Pac. 48.

The judicial rule grounded in equity permitting recovery upon an entire building contract but substantially performed aims to give the proprietor, in substance, and as nearly as practicable, the very thing contracted for; not merely in value, but in form and

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ations will not give the owner essentially what he contracted for;⁷ and relaxation from the strict rule governing entire contracts as to performance must be accorded with great caution, since one has a right, especially in building, to choose for himself, to contract for something which exactly satisfies that choice, and not to be compelled to receive something else; that in the matter of buildings and their decorations, as much as in any conceivable field, mere taste or preference approaching almost a whim might be controlling with the owner, and therefore of the very substance of the contract, so that even trifling variations might be inconsistent with that substantial performance on which should be predicated liability to pay.⁸

character. *Foeller v. Heintz* (1908) 137 Wis. 169, 24 L.R.A. (N.S.) 327, 118 N. W. 543.

⁷ *Hoglund v. Sortedahl*, *supra*.

⁸ *Manthey v. Stock* (1907) 133 Wis. 107, 113 N. W. 443; *Foeller v. Heintz* (1908) 137 Wis. 169, 24 L.R.A. (N.S.) 327, 118 N. W. 543.

So, also, in *Kelly v. Bradford* (1860) 33 Vt. 35, it is said that the doctrine is a relaxation from the strictness of the ancient law, standing upon the solid ground of necessity and equity, but to be guarded with care lest in its application it should tend to relax or impair the obligation and faithful performance of agreements.

The owner is not to be denied, by the application of the substantial performance rule, the right to have his building erected in the manner agreed upon. *Flannery v. Sahagian* (1894) 83 Hun, 109, 31 N. Y. Supp. 360.

In *Jacob & Youngs v. Kent* (1921) 230 N. Y. 239, — A.L.R. —, 129 N. E. 889, it is said: "The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture. *Spence v. Ham* (1900) 163 N. Y. 220, 51 L.R.A. 238, 57 N. E. 412; *Woodward v. Fuller* (1880) 80 N. Y. 312; *Glacius v. Black* (1876) 67 N. Y. 566; *Bowen v. Kimbell* (1909) 203 Mass. 370, 133 Am. St. Rep. 302, 89 N. E. 542. The distinction is akin to that between dependent and independent promises, or between promises and conditions. Anson, Contr. Corbin's ed. § 367; 2 Williston, Contr. § 842. Some promises are so plainly independent that they can never by fair construction be conditions of one another. *Rosenthal Paper Co. v. National Folding Box & Paper Co.* (1919) 226 N. Y. 313, 123 N. E. 766; *Bogardus v. New York L. Ins. Co.* (1886) 101 N. Y. 328, 4 N. E. 522. Others are so plainly dependent that they must always be conditions. Others, though dependent and thus conditions when there is departure in point of substance, will be viewed as independent and collateral when the departure is significant. 2 Williston, Contr. §§ 841, 842; *Eastern Forge Co. v. Corbin* (1903) 182 Mass. 592, 66 N. E. 419; *Robinson v. Mollett* (1874) L. R. 7 H. L. 814, 44 L. J. C. P. N. S. 10 B. R. C.

362; *Miller v. Benjamin* (1894) 142 N. Y. 613, 37 N. E. 631. Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another. The simple and the uniform will call for different remedies from the multifarious and the intricate. The margin of departure within the range of normal expectation upon a sale of common chattels will vary from the margin to be expected upon a contract for the construction of a mansion or a 'skyscraper.' There will be harshness sometimes and oppression in the implication of a condition when the thing upon which labor has been expended is incapable of surrender because united to the land, and equity and reason in the implication of a like condition when the subject-matter, if defective, is in shape to be returned. From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution. Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier. The decisions in this state commit us to the liberal view, which is making its way, nowadays, in jurisdictions slow to welcome it. *H. DAKIN & Co. v. LEE* (reported herewith) *ante*, 700. Where the line is to be drawn between the important and the trivial cannot be settled by a formula. 'In the nature of the case precise boundaries are impossible.' 2 Williston, *Contr.* § 841. The same omission may take on one aspect or another according to its setting. Substitution of equivalents may not have the same significance in fields of art on the one side and in those of mere utility on the other. Nowhere will change be tolerated, however, if it is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract. *Crouch v. Gutmann* (1892) 134 N. Y. 51, 30 Am. St. Rep. 608, 31 N. E. 271. There is no general license to install whatever, in the builder's judgment, may be regarded as 'just as good.' *Easthampton Lumber & Coal Co. v. Worthington* (1906) 186 N. Y. 412, 79 N. E. 323. The question is one of degree, to be answered, if there is doubt, by the triers of the facts (*Crouch v. Gutmann, supra*; *Woodward v. Fuller* (1880) 80 N. Y. 312, *supra*), and, if the inferences are certain, by the judges of the law (*Easthampton Lumber & Coal Co. v. Worthington, supra*). We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, 10 B. R. C.

It has been generally, though not invariably, held that the rule which permits recovery in case of substantial performance applies even though the contract requires the work to be performed to the satisfaction of the owner, his architect, or other representative, since his judgment in the matter is to be exercised reasonably, and not arbitrarily.⁹

And a provision in the contract that the last payment for the work is to be made when the work is completed does not take the case out of the rule.¹⁰

It has also been held that where a building contract provides that the owner may take possession and proceed to complete the contract, and the owner has done so, substantial compliance with the contract may accrue through the action of both the contractor and the owner.^{10½}

It is immaterial that the contract provides that defective work shall be replaced.^{10½}

the cruelty of enforced adherence. Then only can we tell whether literal fulfilment is to be implied by law as a condition. This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture."

⁹ See *Ark-Mo Zinc Co. v. Patterson* (1906) 79 Ark. 506, 96 S. W. 170; *Thomas Haverly Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105; *Allred v. Sheehan* (1921) — Cal. App. —, 202 Pac. 681; *West v. Suda* (1897) 69 Conn. 60, 36 Atl. 1015, 1 Am. Neg. Rep. 578; *Erikson v. Ward* (1915) 266 Ill. 259, 107 N. E. 593, Ann. Cas. 1916B, 497; *Norwood v. Lathrop* (1901) 178 Mass. 208, 59 N. E. 650; *Handy v. Bliss* (1910) 204 Mass. 513, 134 Am. St. Rep. 673, 90 N. E. 864; *Dinnie v. Lakota Hotel Co.* (1922) — N. D. —, 186 N. W. 248; *Crawford v. McKinney* (1895) 165 Pa. 605, 30 Atl. 1045; *Standard Constr. Co. v. Quaker City Cracker Co.* (1920) 73 Pa. Super. Ct. 402; *Walsh Constr. Co. v. Cleveland* (1920) 271 Fed. 701; *Canadian Western Foundry & Supply Co. v. Hoover* (1917) 13 Alberta L. R. 347, [1917] 3 West. Week. Rep. 594, 37 D. L. R. 285; *House Repair & Service Co. v. Miller* (1921) — Ont. —, 64 D. L. R. 115.

But see, *contra*, *Marshall v. Ames* (1896) 11 Ohio C. C. 363, 5 Ohio C. D. 403, in which it is held that a contractor cannot recover if the other party to the contract or his agent in good faith is not satisfied with the performance of the contract, although the court or the jury might think they ought to have been satisfied.

¹⁰ *Gleason v. Smith* (1852) 9 Cush. 484, 57 Am. Dec. 62.

^{10½} *Dinnie v. Lakota Hotel Co.* (1922) — N. D. —, 186 N. W. 248.

^{10½} *Jacob & Youngs v. Kent* (1921) 230 N. Y. 656, 130 N. E. 933, 10 B. R. C.

The doctrine has been held applicable to the case of an entire contract for supervision of the execution by an architect,¹¹ to a contract to paint a house,¹² and to a contract for the construction of a monument.¹³

It has been well to apply as well where the contractor agrees to erect the building on his own lot in accordance with certain plans and specifications, and to sell the lot and building as so completed to another for a specified price, as where the building is erected on a lot owned by the party for whom the structure is to be constructed.¹⁴ This is an extension of the rule beyond the first of the two reasons assigned for it, and so must be justified, if at all, by the second reason.

The rule that a contractor may recover for work substantially performed cannot apply when the uncompleted building has been destroyed by fire, so that the owner has received or accepted no benefit from the work, although at the time of the fire only a trivial amount of work remained to be done.¹⁵ But a recovery under such

The court said: "The promise to replace, like the promise to install, is to be viewed, not as a condition, but as independent and collateral when the defect is trivial and innocent. The law does not nullify the covenant, but restricts the remedy to damages."

¹¹ *Foeller v. Heintz* (1908) 137 Wis. 169, 24 L.R.A.(N.S.) 327, 118 N. W. 543.

¹² *Manthey v. Stock* (1907) 133 Wis. 107, 113 N. W. 443.

¹³ *Stratmeyer v. Hoyt* (1919) 189 Iowa, 85, 174 N. W. 243; *Hughes v. Ferguson* (1885) 23 N. Y. Week. Dig. 185.

In *Gessler v. Graham* (1912) 234 Pa. 586, 83 Atl. 429, an action on a contract for the erection of a monument in a cemetery, it was held that the defendant had no just cause of complaint of an instruction that if the granite used was the kind stipulated for, but the workmanship was not perfect, but substantially complied with the contract, the plaintiff might recover the contract price less an abatement or allowance for minor defects.

But in *Oakes v. Barbre* (1906) 127 Ill. App. 208, the rule as to substantial performance of building contracts generally was held not applicable to a contract for the erection of a monument; the court saying that persons contracting for the construction and erection of monuments to perpetuate the memory and mark the place of their dead are entitled to insist upon a strict compliance with the specifications as to design and character of workmanship. (For later appeal of this case, see (1909) 149 Ill. App. 646).

¹⁴ *Giberson v. Fink* (1915) 28 Cal. App. 25, 151 Pac. 371; *Nance v. Patterson Bldg. Co.* (1910) 140 Ky. 564, 140 Am. St. Rep. 398, 131 S. W. 484.

¹⁵ *Watson v. Alta Invest. Co.* (1910) 12 Cal. App. 560, 108 Pac. 48.

And where, under a clause in a contract providing how the loss

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circumstances as for substantial performance has been allowed in a case in which the contract provided that "all work, and material as delivered on the premises to form part of the work, are to be considered the property of the proprietors," and that "the proprietors shall insure the building from time to time, to the extent of at least two thirds of its value during the course of erection."¹⁵

The rule permitting a recovery in case of substantial performance being based on equitable considerations, it is usually stated as an essential to its application that the contractor must have acted in good faith¹⁶ and have unintentionally failed.¹⁷

should be borne in case of an earthquake, the question whether a portion of the contract price is due a builder depends upon the completion and acceptance of the work by the owner and architect. The contractor cannot recover upon a showing that the cost of finishing the work would be only \$39, since the doctrine of substantial performance does not apply to such a case. *Seebach v. Kuhn* (1908) 9 Cal. App. 485, 99 Pac. 723.

¹⁵ *Taylor Hardware Co. v. Hunt* (1917) 39 Ont. L. Rep. 85, 35 D. L. R. 504.

¹⁶ ARKANSAS.—*Mitchell v. Caplinger* (1911) 97 Ark. 278, 133 S. W. 1032.

CALIFORNIA.—*Harlan v. Stufflebeem* (1891) 87 Cal. 508, 25 Pac. 686; *Marchant v. Hayes* (1897) 117 Cal. 669, 49 Pac. 840; *Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105; *Joseph Musto Sons-Kenan Co. v. Pacific States Corp.* (1920) — Cal. App. —, 192 Pac. 138.

COLORADO.—*Morris v. Hikosona* (1914) 26 Colo. App. 251, 143 Pac. 826.

CONNECTICUT.—*Pinches v. Swedish E. L. Church* (1887) 55 Conn. 183, 10 Atl. 264; *Morehouse v. Bradley* (1908) 80 Conn. 611, 69 Atl. 937.

DISTRICT OF COLUMBIA.—*Beha v. Ottenberg* (1887) 6 Mackey, 348.

ILLINOIS.—*Peterson v. Pusey* (1908) 237 Ill. 204, 86 N. E. 692; *Cook v. American Luxfer Prism Co.* (1901) 93 Ill. App. 299.

IOWA.—*Stratmeyer v. Hoyt* (1919) 189 Iowa, 85, 174 N. W. 243.

KENTUCKY.—*Vincennes Bridge Co. v. Walker* (1918) 181 Ky. 651, 205 S. W. 778.

MASSACHUSETTS.—*Gleason v. Smith* (1852) 9 Cush. 484, 57 Am. Dec. 62; *Veazie v. Hosmer* (1858) 11 Gray, 396; *McCue v. Whitwell* (1892) 156 Mass. 205, 30 N. E. 1134; *Handy v. Bliss* (1910) 204 Mass. 513, 134 Am. St. Rep. 673, 90 N. E. 864; *Lynch v. Culhane* (1922) — Mass. —, 135 N. E. 119.

MINNESOTA.—*Elliott v. Caldwell* (1890) 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845; *Anderson v. Pringle* (1900) 79 Minn. 433, 82 N. W. 682; *Snider v. Peters Home Bldg. Co.* (1918) 139 Minn. 413, 167 N. W. 108.

MISSOURI.—*Boteler v. Roy* (1890) 40 Mo. App. 234.

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Accordingly the rule cannot be invoked where the failure to perform is wilful and intentional,¹⁸ or due to carelessness,¹⁹ unless the

NEW YORK.—*Glacius v. Black* (1872) 50 N. Y. 145, 10 Am. Rep. 449; *Phillip v. Gallant* (1875) 62 N. Y. 256; *VanClief v. Van Vechten* (1892) 130 N. Y. 571, 29 N. E. 1017; *Jacob & Youngs v. Kent* (1921) 230 N. Y. 239, — A.L.R. —, 129 N. E. 889; *Smith v. Gugerty* (1848) 4 Barb. 614; *Hughes v. Ferguson* (1885) 23 N. Y. Week. Dig. 185; *John R. Carpenter Co. v. Ellsworth* (1912) 151 App. Div. 532, 136 N. Y. Supp. 108.

NORTH DAKOTA.—*Anderson v. Todd* (1898) 8 N. D. 158, 77 N. W. 599; *Braseth v. State Bank* (1904) 12 N. D. 486, 98 N. W. 79; *Kasbo Constr. Co. v. Minto School Dist.* (1921) — N. D. —, 184 N. W. 1029.

OHIO.—*Kane v. Stone Co.* (1883) 39 Ohio St. 1, affirming (1879) 4 Ohio Dec. Reprint, 509; *Ashley v. Henahan* (1897) 56 Ohio St. 559, 47 N. E. 573.

OKLAHOMA.—*Kelley v. Hamilton* (1920) 78 Okla. 179, 189 Pac. 535.

OREGON.—*Pippy v. Winslow* (1912) 52 Or. 219, 125 Pac. 298.

PENNSYLVANIA.—*Chambers v. Jaynes* (1846) 4 Pa. 39; *Danville Bridge Co. v. Pomroy* (1850) 15 Pa. 151; *Sticker v. Overpeck* (1889) 127 Pa. 446, 17 Atl. 1100; *Gallagher v. Sharpless* (1890) 134 Pa. 134, 19 Atl. 491; *White v. Braddock School Dist.* (1893) 159 Pa. 201, 28 Atl. 136; *Pressy v. McCornack* (1912) 235 Pa. 443, 84 Atl. 427; *Standard Constr. Co. v. Quaker City Cracker Co.* (1920) 73 Pa. Super. Ct. 402.

SOUTH DAKOTA.—*Aldrich v. Wilmarth* (1893) 3 S. D. 523, 54 N. W. 811, rehearing denied in (1893) 3 S. D. 530, 54 N. W. 813; *Hulst v. Benevolent Hall Asso.* (1896) 9 S. D. 144, 68 N. W. 200.

UTAH.—*Foulger v. McGrath* (1908) 34 Utah, 86, 95 Pac. 1004.

VERMONT.—*Kelly v. Bradford* (1860) 33 Vt. 35.

WISCONSIN.—*Manthey v. Stock* (1907) 133 Wis. 107, 113 N. W. 443; *Foeller v. Heintz* (1908) 137 Wis. 169, 24 L.R.A.(N.S.) 327, 118 N. W. 543.

In *Blakeslee v. Holt* (1875) 42 Conn. 226, however, it was said that intent to perform a contract, and partially performing, and an honest belief that the performance has been perfect, are not enough. Where these facts are found there may exist no moral delinquency, but what has been lawfully agreed to be done must be actually done to give a party standing on the contract in a court of law. The sanctity of contracts must be upheld.

¹⁷ *Veazie v. Hosmer* (1858) 11 Gray, 396; *Mitchell v. Dunmore Realty Co.* (1908) 126 App. Div. 829, 111 N. Y. Supp. 322.

¹⁸ *Lynch v. Cushman* (1920) 237 Mass. 172, 129 N. E. 717; *Turner v. Henning* (1920) 49 App. D. C. 183, 262 Fed. 367; *Handy v. Bliss* (1910) 204 Mass. 513, 134 Am. St. Rep. 673, 90 N. E. 864; *Elliott v. Caldwell* (1890) 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845; *Glacius v. Black* (1876) 67 N. Y. 563; *Crane v. Kubel* (1874) 61 N. Y. 645; *Phillip v. Gallant* (1875) 62 N. Y. 256; *East-*
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hampton Lumber & Coal Co. v. Worthington (1906) 186 N. Y. 407, 79 N. E. 323; *Anderson v. Pelereit* (1895) 86 Hun, 600, 33 N. Y. Supp. 741; *Fox v. Davidson* (1899) 36 App. Div. 159, 55 N. Y. Supp. 524 (for later appeals not involving the point, see (1879) 40 App. Div. 620, 58 N. Y. Supp. 147; (1901) 65 App. Div. 262, 73 N. Y. Supp. 533; (1906) 111 App. Div. 174, 97 N. Y. Supp. 603); *Mitchell v. Dunmore Realty Co.* (1908) 126 App. Div. 829, 111 N. Y. Supp. 322; *D'Amato v. Gentile* (1900) 54 App. Div. 625, 66 N. Y. Supp. 853 (affirmed without opinion in (1903) 173 N. Y. 596, 65 N. E. 1116); *North American Wall Paper Co. v. Jackson Constr. Co.* (1915) 167 App. Div. 779, 153 N. Y. Supp. 204; *Danville Bridge Co. v. Pomroy* (1850) 15 Pa. 151; *Wade v. Haycock* (1855) 25 Pa. 382; *Snedaker v. Torpey* (1909) 41 Pa. Super. Ct. Rep. 312; *Smyers v. Zmitrovitch* (1913) 55 Pa. Super. Ct. 440; *Beyer v. Mountz* (1915) 60 Pa. Super. Ct. 22; *McAdams v. Smith* (1917) 65 Pa. Super. Ct. 568; *Mortimer v. Dirks* (1910) 57 Wash. 402, 107 Pac. 184; *Smith v. Rugginero* (1900) 52 App. Div. 382, 65 N. Y. Supp. 89, affirmed in (1903) 173 N. Y. 614, 66 N. E. 1116.

One who intentionally fails to observe portions of the building specifications, and repeatedly refuses to remedy defects, is not entitled to the benefit of the doctrine of substantial performance. *Turner v. Henning* (1920) 49 App. D. C. 183, 262 Fed. 637.

Instructions which permit a recovery although the jury should find that the plaintiff in bad faith departed from the contract in two particular things not trivial, if it should also find that there was no bad faith which went to the essence of the building itself,—which affected it finally in its value, and was not of such a substantial character as to defeat any right of action whatsoever,—are erroneous. *Lynch v. Culhane* (1920) 237 Mass. 172, 129 N. E. 717.

To justify a recovery upon a contract as substantially performed, the omissions or deviations must be the result of mistake or inadvertence, and not intentional, much less fraudulent. *Elliott v. Caldwell* (1890) 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845.

There is no substantial performance when no attempt is made to comply with the express requirements of the specifications and no excuse or explanation is given for failure to do so. *Easthampton Lumber & Coal Co. v. Worthington* (1906) 186 N. Y. 407, 79 N. E. 323.

In *Danville Bridge Co. v. Pomroy* (1850) 15 Pa. 151, it was said that the indulgence as to substantial performance was not to be so stretched as to cover fraud, gross negligence, or obstinate or wilful refusal to fulfil the whole agreement, or even a voluntary and causeless abandonment of it.

The rule is for the benefit of the honest, skilful, and prudent contractor who faithfully endeavors to live up to the terms of his agreement, but through mistake or inadvertence fails in unimportant particulars; and it cannot be invoked by those who wilfully and intentionally violate and breach their contract. *Mortimer v. Dirks* (1910) 57 Wash. 402, 107 Pac. 184.

¹⁹ *John R. Carpenter Co. v. Ellsworth* (1912) 151 App. Div. 532, 10 B. R. C.

omission is such as to fall within the category of *de minimis*,²⁰ or unless the omissions, though intentional, are due to a belief that performance in that respect is not required.²¹

Ordinarily, it is incumbent upon the contractor who has not completely performed his contract to show that the omissions or changes are slight, and not substantial, and unintentional, and the expense of supplying them,²² but in some instances the burden of showing the

136 N. Y. Supp. 108; *Foeller v. Heintz* (1908) 137 Wis. 169, 24 L.R.A. (N.S.) 327, 118 N. W. 543.

²⁰ When there is a wilful refusal by the contractor to perform his contract, and he wholly abandons it, and after due notice refuses to have anything to do with it, his right to recover depends upon the performance of his contract without any omission so substantial in its character as to call for an allowance of damages if he had acted in good faith. *Van Clief v. Van Vechten* (1892) 130 N. Y. 571, 29 N. E. 1017. The court said that while slight and insignificant imperfections or deviations might be overlooked, on the principle of *de minimis non curat lex*, the contract in other respects must be performed according to its terms. When the refusal to proceed is wilful, the difference between substantial and literal performance is bounded by the line of *de minimis*.

See also, in this connection, *Jacob & Youngs v. Kent* (1921) 230 N. Y. 239, — A.L.R. —, 129 N. E. 889; *Lynch v. Culhane* (1920) — Mass. —, 129 N. E. 717.

²¹ It is not true that any conscious deviation from the absolute terms of the agreement causes a failure of performance. *Smith v. Matthews Constr. Co.* (1919) 179 Cal. 797, 179 Pac. 205.

An intentional omission to do certain things called for by the contract, if the builder believes that they are not called for and intends in good faith to do all that he has agreed to do, does not prevent the application of the doctrine. *Handy v. Bliss* (1910) 204 Mass. 513, 134 Am. St. Rep. 673, 90 N. E. 864.

In *Smith v. Clark* (1886) 5 N. Y. S. R. 165, it was held that there may be a substantial performance of a contract to build a school-house, although the contractor knowingly used basswood instead of pine for the ceiling, if, from negotiations with the trustee, the contractor understood and in good faith believed that the trustee had given his consent to the change, although he had not in fact done so.

Failure on the part of a contractor for the erection of a small school building to install ventilators will not prevent a recovery as for substantial performance, where the omission was due to the fact that one of the trustees who had principal charge of the work said that he need not do so. *Smith v. Russell* (1910) 140 App. Div. 102, 125 N. Y. Supp. 952, s. c. on subsequent appeal in (1911) 144 App. Div. 847, 129 N. Y. Supp. 461, which is affirmed without opinion in (1912) 207 N. Y. 644, 100 N. E. 1134.

²² *Morris v. Hokesona* (1914) 26 Colo. App. 251, 143 Pac. 826; *Nesbit v. Braker* (1905) 104 App. Div. 393, 93 N. Y. Supp. 856; *John R. Carpenter Co. v. Ellsworth* (1912) 151 App. Div. 532, 136 10 B. R. C.

amount necessary to remedy the defects may rest upon the owner.²³

III. What constitutes substantial performance.

a. In general.

Just what the term "substantial performance," or "substantial compliance," as applied to contracts, connotes, is admittedly difficult to state.²⁴ No very great advance is made by saying, as is said in

N. Y. Supp. 108; *McElraevy & H. Co. v. St. Joseph's Home* (1913) 143 N. Y. Supp. 235; *Asbestos Plastering Co. v. Norcross Bros. Co.* (1915) 153 N. Y. Supp. 681; *Gens v. Tuscany Realty Co.* (1917) 166 N. Y. Supp. 1076; *Christy v. Price* (1909) 223 Pa. 551, 72 Atl. 895.

²³ While the burden of proof is ordinarily on a contractor seeking to recover on the ground of substantial performance, to establish the amount necessary to compensate the defendant for failure of performance, such burden may be shifted to the employer if it be assumed in the pleading and on the trial; and such is the case where the employer pleads a so-called counterclaim for damages which is in effect nothing more than a statement of defects complained of and the particulars in which the contract is not complied with. *Morris v. Hikosona* (1914) 26 Colo. App. 251, 143 Pac. 826.

In *Leeds v. Little* (1890) 42 Minn. 414, 44 N. W. 309, and *Walsh Constr. Co. v. Cleveland* (1920) 271 Fed. 701, it is held that, if in an action by the contractor for the contract price, based on his substantial performance, the other party wishes to claim a deduction on account of defects or omissions, the burden is upon him to allege and prove his damages.

²⁴ In *Steel Storage & Elevator Constr. Co. v. Stock* (1919) 225 N. Y. 173, 121 N. E. 786, it was said that "substantial performance is a term of law which conveys little if any meaning to the lay mind, and ordinarily sends the lawyer to his digest to discover the most reasonable illustration of its judicial rule."

On the other hand, in *Nance v. Patterson Bldg. Co.* (1910) 140 Ky. 564, 140 Am. St. Rep. 398, 131 S. W. 494, it is said that "material change" and "substantial compliance" where the matter is not so marked as not to admit of dispute, is best left to the jury without further definition of the terms, they being expressions of such common use that to undertake to further define them is more apt to confuse than aid the jury.

In *Crouch v. Gutmann* (1892) 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271, it is said that the term "substantial performance," in its practical application to building contracts, has, perhaps necessarily, become somewhat indefinite otherwise than that the builder must have, in good faith, intended to comply with the contract, and should substantially have done so in the sense that the defects are not pervasive, do not constitute a deviation from the general plan contemplated for the work, and are not so essential that the object

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one case,²⁵ that "substantial performance is performance except as to unsubstantial omissions."

With regard to the measure of permissible deviations from the terms of the contract, the rule is that the employer must have received substantially what he bargained for.²⁶ It is not enough that

of the parties in making the contract, and its purposes, could not, without difficulty, be accomplished by remedying them.

²⁵ *Spence v. Ham* (1900) 163 N. Y. 220, 51 L.R.A. 238, 57 N. E. 412.

²⁶ A contractor who has endeavored in good faith to perform his part of the agreement and has substantially performed, there being unimportant defects arising from accident or inadvertence and which do not defeat or materially change the object of the contract, may recover the price less the damages caused by the defects. *Jones & L. Steel Co. v. Abner-Doble Co.* (1912) 162 Cal. 497, 123 Pac. 290.

The omissions and deviations must not substantially affect the usefulness of the building for the purposes for which it was intended. *Thomas Havery Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105; *Buchholz v. Rosenberg* (1916) 163 Wis. 312, 156 N. W. 946.

Deviations from the contract which are under the circumstances light, trivial, inconsequential, and inconsiderable, if not wilful, will not prevent a recovery under the contract. *Pratt v. Dunlap* (1912) 85 Conn. 180, 82 Atl. 195.

To entitle the contractor to recover there must be an honest intention to perform the contract and an attempt to perform it. There must be such an approximation to complete performance that the owner obtains substantially what was called for in the contract, although it may not be the same in every particular, and although there may be omissions and imperfections on account of which there should be a deduction from the contract price. It is not necessary that the work should be complete in all material respects, nor that there should be no omissions of work that cannot be done by the owner except at great expense or with great risk to the building. There may be omissions of that which could not afterward be supplied exactly as called for by the contract without taking down the building to its foundation, and at the same time the omission may not affect the value of the building for use or otherwise except so slightly as to be hardly appreciable. Notwithstanding such omissions, there might be a substantial performance of the contract. *Handy v. Bliss* (1910) 204 Mass. 513, 134 Am. St. Rep. 673, 90 N. E. 864.

See also, to the same effect, *Lynch v. Culhane* (1922) — Mass. —, 135 N. E. 119.

The defects must not be so essential that the object which the parties intended to accomplish, to have a specified amount of work performed in a particular manner, is not accomplished. *Phillip v. Gallant* (1875) 62 N. Y. 256; *Elliott v. Caldwell* (1890) 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845.

The departures and variations must not be wilful, and must be
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technical and unsubstantial, and in unimportant and immaterial particulars. *Glacius v. Black* (1876) 67 N. Y. 563.

There is not a substantial performance of a building contract if the defects run through the whole work, or are so essential that the object of the parties to have a sufficient amount of work done in a particular manner was not accomplished. *Woolreich v. Fettretch* (1889) 51 Hun, 640, 21 N. Y. S. R. 56, 4 N. Y. Supp. 326.

Substantial performance of a building contract is not made out where the defects pervade the whole work, are very substantial, and not merely unimportant, and where some, if not many, of them are wilful and intentional departures or omissions from the contract. *Smith v. Ruggiero* (1900) 52 App. Div. 382, 65 N. Y. Supp. 89, affirmed in (1903) 173 N. Y. 614, 66 N. E. 1116.

If the defects are not pervasive, do not amount to a deviation from the general plan, and are not so essential that they may not be remedied without difficulty, then the contract will be held substantially performed. *Greenberg v. Lumb* (1911) 129 N. Y. Supp. 182.

Failure to perform all the terms of the contract in full must be slight and unintentional. *Asbestos Plastering Co. v. Noxcross Bros. Co.* (1915) 153 N. Y. Supp. 681.

In *Kasbo Constr. Co. v. Minto School Dist.* (1921) — N. D. —, 184 N. W. 1029, the court held that there was no error in an instruction that, to constitute substantial performance, it must appear that the contractor endeavored in good faith to perform, and has done so except as to unimportant omissions or deviations which are the result of mistake or inadvertence, and were not intentional, and which are susceptible of remedy, so that the other party will get substantially the building he contracted for.

Whether there has been substantial performance depends upon the character of the changes or alterations complained of; that is to say, whether they materially affect the completed structure and were, in good faith, honestly intended to fulfil the contract. *Pressy v. McCornack* (1912) 235 Pa. 443, 84 Atl. 427.

In *Foulger v. McGrath* (1908) 34 Utah, 86, 95 Pac. 1004, the court said that a substantial compliance, if made in good faith and so as to make the thing contracted for useful and beneficial to the owner for the purposes for which it was intended, and in compliance with the true intent and spirit of the contract, in most instances, was a sufficient compliance to permit a recovery upon the contract, with the right of the owner to recoup any damages he might have sustained by reason of the contractor's failure literally to comply with the terms of the contract.

In order to bring the case within the rule, the structure as completed must be the result of good-faith efforts strictly to perform, and must satisfy with exactness all essentials to the accomplishment of the proprietor's purpose. *Foeller v. Heintz* (1908) 137 Wis. 169, 24 L.R.A.(N.S.) 327, 118 N. W. 543.

Incompleteness consistent with substantial performance can be remedied, structurally, practicably, and reasonably, that is, without

he has received its equivalent in value;²⁷ and the omissions must ordinarily²⁸ be such as are capable of remedy and for which the owner may be compensated by a deduction from the contract price of the expense of doing the work.²⁹

an expenditure of an unreasonable amount of money, when the element of incompleteness can be obviated without destruction of any material part of the building erected in accordance with the contract. *Ibid.*

The test of substantial performance is not inconsistent with imperfections in matters of detail not defeating the object of the proprietor by going to the root of the matter, yet requiring a considerable outlay to afford him, for a given amount of money, in substance the thing agreed upon. *Ibid.*

²⁷ The fact that the structure as completed is of as great or even of greater market value than the one called for is not controlling. *Ibid.*

That materials substituted for those specified in the contract are just as good, or are such as it is usual and customary to use in good and workmanlike jobs of similar kind, does not render their use a substantial performance of the contract. *Cannon v. Hunt* (1902) 116 Ga. 452, 42 S. E. 734; *Maner v. Clark-Stewart Co.* (1921) — Ga. App. —, 109 S. E. 178.

In *Fauble v. Davis* (1878) 48 Iowa, 462, it was held that the fact that a deviation from the plans and specifications does not affect either the strength, value, or convenience of the building, does not render such deviation unimportant. The court said that one who contracts to have a building erected according to certain plans and specifications should not be compelled to accept any kind of a building which, in the judgment of others, is equal in strength, value, and convenience. It might be of great importance to him to have a building to suit his idea of convenience.

²⁸ Compare *Handy v. Bliss* (1910) 204 Mass. 513, 134 Am. St. Rep. 673, 90 N. E. 864, set out in footnote 26, *supra*.

²⁹ The doctrine of "substantial performance" permits any such omissions or deviations from the contract as are inadvertent or unintentional, are not due to bad faith, do not impair the structure as a whole, are remediable without doing material damage to other parts of the building in tearing down and reconstructing, and may without injustice be compensated for by deductions from the contract price. *Mitchell v. Caplinger* (1911) 97 Ark. 278, 133 S. W. 1032; *Roseburn v. McDaniel* (1921) 147 Ark. 203, 227 S. W. 397; *Stratmeyer v. Hoyt* (1919) — Iowa, —, 174 N. W. 243; *Pippy v. Winslow* (1912) 62 Or. 219, 125 Pac. 298.

If the omission or imperfection is so slight that it cannot be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor by recoupment for damages, the contractor does not lose his right of action. *Harlan v. Stufflebeem* (1891) 87 Cal. 508, 25 Pac. 686.

If there has been a substantial performance of the contract by
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the contractor in good faith, where the failure to make full performance can be compensated in damages, to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not wilful or fraudulent and do not substantially affect the usefulness of the building for the purposes for which it was intended, a contractor may, in an action upon the contract, recover the amount unpaid of his contract price, less the amount allowed as damages for the failure in strict performance. *Thomas Haverly Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105.

Deviations and omissions not due to bad faith, which do not impair the structure as a whole, which can be conveniently remedied, and which may be paid for by deduction from the contract price, do not justify a claim of noncompliance with the contract. *Stewart v. Breckenridge* (1917) 69 Colo. 108, 169 Pac. 543.

A building contract is substantially performed where the alleged defects complained of do not affect the usefulness of the house, and are such that compensation may be made by an allowance to the owner. *Louthan v. Carson* (1917) 63 Colo. 473, 168 Pac. 656.

Substantial performance permitting a recovery on a contract means an attempt in good faith strictly and fully to perform, and is not satisfied unless there have been only slight or inadvertent omissions or departures which have not affected the value of the structure, and which are capable of remedy, and for which the employer may be compensated by a reduction of the contract price. *Morris v. Hokosona* (1914) 26 Colo. App. 251, 143 Pac. 826.

In *Vincennes Bridge Co. v. Walker* (1918) 181 Ky. 651, 205 S. W. 778, it is said: "A substantial compliance with the contract for the erection of a building or structure is a term which is not easily defined as applied to all buildings and to all contracts. Where things are omitted by the builder which cannot be supplied by the owner, except at great cost or risk to the structure, or where the deviations from the plans and specifications are so substantial that an allowance out of the contract price will not provide the owner with what he contracted for, or where the contract provides specifically for certain materials, and others are substituted, it has been held that there has not been a substantial compliance."

The doctrine of substantial performance does not apply when the variations from the terms of the contract are so substantial that an allowance out of the contract price for damage for deviations would not give the owner substantially what he contracted for. *Hoglund v. Sortedahl* (1907) 101 Minn. 359, 112 N. W. 408.

To justify a recovery upon a contract substantially performed, the omissions or deviations must have been slight or susceptible of remedy, so that an allowance out of the contract price would give the other party substantially what he contracted for. *Elliott v. Caldwell* (1890) 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845; *Anderson v. Pringle* (1900) 79 Minn. 433, 82 N. W. 682; *Snider v. Peters Home Bldg. Co.* (1918) 139 Minn. 413, 167 N. W. 108.

Unimportant defects arising through accident, not being such as to defeat or change the design embodied in the contract, will not

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Damage done to the building by the contractor's employees has no bearing on the question of substantial performance.²⁹¹

b. In particular instances.

The question of substantial performance is one to be determined in each case with reference to the existing facts and circumstances,³⁰ and no generalization upon the cases may, therefore, be made. The decisions are arranged so far as practicable in the subjoined footnote,³¹ under headings indicative of the character of the work or the nature of the deficiencies therein.

preclude a recovery. *Mitchell v. Spurrier Lumber Co.* (1912) 31 Okla. 834, 124 Pac. 10.

²⁹¹ *Thomas Haverly Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105.

³⁰ *Connell v. Higgins* (1915) 170 Cal. 541, 150 Pac. 769; *Collins v. Ramish* (1920) 182 Cal. 360, 188 Pac. 550; *Thomas Haverly Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105; *Joseph Misto Sons-Keenan Co. v. Pacific States Corp.* (1920) — Cal. App. —, 192 Pac. 138.

³¹ **Bridges.**

In *Vincennes Bridge Co. v. Walker* (1918) 181 Ky. 651, 205 S. W. 778, it was said to be too apparent for argument that a bridge was not erected in substantial compliance with the contract where the contract provided for steel legs as supports for the bridge, to come down to and rest upon concrete bases 3 feet square and 2 feet in thickness, and the steel legs provided were too short by as much as 11 feet, and the concrete bases were 28 inches square and the shortness of the legs supplied by extending the bases up to meet them, and the walkway in many places lacked from 1 to 5 or 6 inches of being the required 4 feet in width, and steel rods were used in place of angle iron required by the contract, the banisters were 5½ feet in height instead of being 5 feet, and the bridge instead of being straight was very crooked, and instead of being level was 8½ feet higher at one end than the other.

In *Danville Bridge Co. v. Pomroy* (1850) 15 Pa. 151, failure to provide a bridge with cast-iron pedestals to protect the girders from injury by wagon wheels, and tin coverings at the junction of the posts and truss braces, and failure to fasten the floor with wooden pins, were held to be omissions of such trifling import as to be the subjects of compensation in damages. The court said that they did not enter vitally into the structure. The bridge might be, and had been, profitably used without them, and, at all events, the application of a very small sum of money would supply them with as much effect as though they had been placed there by the contractors.

In *Kelly v. Bradford* (1860) 33 Vt. 35, the deficiencies of a bridge consisted in the interlocking of the long timbers or chords, which did not appear to have been put together with sufficient

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strength and thoroughness of workmanship to bear the strain that was to come upon them. This defect was one which would not at first have been apparent, but which, after the bridge had been used and subjected to a severe test by the drawing of heavy loads of stone over it, began to appear. In the outset a slight additional expense would probably have remedied the insufficiency, but after the arch had been used for some six months and become depressed to a level, the expense of restoring it and making it as safe and durable as the contract required was much more. The court said that the failure was due to the mismanagement and misfortune of the builders, and should not subject them to a total loss of their labor. So severe a rule would hardly be consistent with a reasonable regard for the infirmity of human nature, and for that liability to mistake and failure which attend upon the best efforts of wise and skilful men.

Cellar.

In *MacKnight Flintic Stone Co. v. New York* (1898) 31 App. Div. 232, 52 N. Y. Supp. 747, it was held that failure to make a water-tight cellar, as required by the contract, is a defect which pervades the whole contract, so as to preclude a recovery on the theory of substantial performance, and the substitution of an ejector to drain the cellar does not make it water-tight, as that term is used in the contract. The judgment was reversed, however, in (1899) 160 N. Y. 72, 54 N. E. 661, on the ground that if the defect was in the plan, and not in the materials and workmanship, the contractor could recover.

Cesspools.

A contract to build foundations of three houses, providing that the bottom stone should be laid according to the usual building regulations, that the cesspools should be 6 feet square and 8 feet deep, and that they should be cemented throughout and covered with a brick arch, is not substantially performed where the bottom stone was not laid in accordance with the usual building regulations, was not of the size called for, or laid as provided by law; the cesspools were not constructed as required by the contract, in consequence of which the owner received a notification from the building department that the cesspools were not water-tight, as required by law, and he was required to spend \$30 in cementing the bottoms thereof, and an additional outlay of \$90 would be required to make them comply with the building regulations. *Cahill v. Heuser* (1896) 2 App. Div. 292, 37 N. Y. Supp. 736.

Cupboards, closets, etc., omission of.

Omission to place in the kitchen cupboards called for by the contract will not prevent a contract to build a house from being considered as substantially performed. *Giberson v. Fink* (1915) 28 Cal. App. 25, 151 Pac. 371.

For another instance in which a defect complained of was a failure to put in a cupboard, see *Rischard v. Miller* (1920) 182 Cal. 351, 188 Pac. 50, under heading "Miscellaneous."

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Floors.

Where the contract was to put in parquet floorings throughout the house, the work to be "first-class," which required the blocks to be so laid as to leave no space between them, with materials so seasoned and prepared as not to shrink, and the evidence showed that the blocks continued to shrink and leave open spaces between them, although the floor was repaired several times, and it appeared that the blocks had been brought to the house on open wagons, and had been exposed to the rain, it was held that a substantial performance was not shown. *Boughton v. Smith* (1894) 142 N. Y. 674, 37 N. E. 470, reversing (1893) 51 N. Y. S. R. 316, 22 N. Y. Supp. 148.

A contract to lay floors which will be hard and serviceable is not complied with by laying floors which as laid became soft and discolored and retained the marks of shoe prints. *Asbestolith Mfg. Co. v. Kerley* (1911) 129 N. Y. Supp. 512.

See also *Joseph Musto Sons-Keenan Co. v. Pacific States Corp.* (1920) — Cal. App. —, 192 Pac. 138, under heading "Tile and marble work;" and *Rush v. Wagner* (1890) 34 N. Y. S. R. 798, 12 N. Y. Supp. 2, set forth in footnote 37, *post*.

For another instance in which the mode of constructing the floor was one of the defects complained of, see *Smith v. Scott's Ridge School Dist.* (1850) 20 Conn. 312, under heading "Miscellaneous."

Foundations.

See *infra*, under heading "Walls and foundations."

Heating apparatus.

The failure to supply a furnace which meets a guaranty that the house will be adequately heated, and the installation of one which lets gases through the house, are not such light or unimportant omissions or defects, caused by inadvertence, as to permit a recovery as for substantial performance. *Adkins v. Lee* (1907) 138 Ill. App. 8.

A contract to install a heating plant may be considered as substantially performed notwithstanding the fact that the radiation in one room is a few feet less than was called for by the specification. *Ruddy v. McDonald* (1907) 149 Ill. App. 111 (modified on other grounds in (1910) 244 Ill. 494, 91 N. E. 651).

A contract to install a boiler capable of supplying a certain number of feet of radiating surface, and insurable, is not substantially complied with where the boiler furnished fell short approximately one third in heating capacity, and was not insurable. *McElraevy & H. Co. v. St. Joseph's Home* (1913) 143 N. Y. Supp. 235.

Where it appears that it would require the addition of 300 feet of radiation to make a heating plant comply with the contract, it is error to find that there has been substantial performance of the contract. *Symms-Powers Co. v. Kennedy* (1914) 33 S. D. 355, 146 N. W. 570.

For another instance in which failure to install an adequate heating plant was a defect complained of, see *Mason v. Griffith* (1917) 281 Ill. 246, 118 N. E. 18, under heading "Miscellaneous."

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For an instance of substantial performance of a contract to construct a steam-heating plant, see *Thomas Havery Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105, under heading "Pipes and plumbing."

See also *Burgi v. Rudgers* (1906) 20 S. D. 646, 108 N. W. 253; *Hankee v. Arundel Realty Co.* (1906) 98 Minn. 219, 108 N. W. 842; *Otis Elevator Co. v. Dusenbury* (1905) 47 Misc. 450, 95 N. Y. Supp. 959, set out in footnote 33, *post*.

Masonwork.

In *Gustavson v. McGay* (1884) 12 Daly (N. Y.) 423, a verdict on conflicting testimony, that a building contract was substantially performed, was held to entitle the contractor to his pay, although there were undisputed departures from the letter of the specifications. In this case the owner proved that, in the foundation wall, the through stones of heading courses were laid every 3 feet instead of 2 feet; that there was no sill provided for the rear cellar window, although plaintiff was to furnish sills and lintels for all windows; that there was but one row of cross bridging in each tier of beams instead of two rows; that there were no anchors provided for the first row, although these were required for the outside walls of each tier of beams; that one of the flues was left rough or obstructed when all was to be well parged and clear; and that certain of the brick in the heading courses was broken or half brick, when perfect brick was required for all the heading courses; and that a great number of the brick used in the walls were broken or half bricks when the contract called for brick with no defects.

Where the builder intentionally failed to trowel-strike the brickwork on one side of the building, as required, and left numerous holes in the wall, and used brickbats of all sizes in the construction thereof, so as to deviate from the specifications, and laid them in uneven lines, and where he neglected to finish the front walls of the building in what is known as a "beaded finish," and used inferior materials in other portions of the building, so that noncompliance with the specifications was general and compliance a rare exception, it was held that the contract had not been substantially performed. *Braseth v. State Bank* (1904) 12 N. D. 486, 98 N. W. 79.

Materials, substitution of.

A contract is not substantially performed by substituting for that which is expressly required, materials, methods, or workmanship which, in the opinion of the contractor and his experts, are just as good, unless the substitution relates to a matter of minor importance, is made in good faith and for sufficient reasons, and there is an adequate allowance for the difference. *Easthampton Lumber & Coal Co. v. Worthington* (1906) 186 N. Y. 407, 79 N. E. 323. The court said that the owner had a right to what the contractor agreed to give him, and unless he had it, or, when failure was neither wilful nor substantial, was fully compensated for the omission, there was no substantial performance, and there could be no recovery. It 10 B. R. C.

was not sufficient for the contractor to build "a house," but he **must** build "the house" contracted for, and substantially comply with the specifications as to the method of construction, materials, and workmanship, before he was entitled to payment. To the same effect is *Easthampton Lumber & Coal Co. v. Worthington* (1906) 186 N. Y. 581, 79 N. E. 325.

Where a contract provides that a job shall be done by the use of specified materials, the owner for whom the work is to be done, and for whom the material is to be used, is entitled to stand upon the express terms of the agreement, and the fact that other and different materials, which were to some extent substituted, may be shown to have been just as good as those specified by the contract, or that it was usual and customary thus to make use of such other materials in good and workmanlike jobs of similar kind, will not be sufficient to show a substantial compliance with the terms of the contract; but, upon proof of such a variation therefrom, the owner will be entitled to damages. *Maner v. Clark-Stewart Co.* (1921) — Ga. App. —, 109 S. E. 178; *Cannon v. Hunt* (1902) 116 Ga. 452, 42 S. E. 734.

A contract which called for "No. 1 rustic and the best quality of joist and studding" was held not substantially performed where the contractor used second quality of joist and studding, and No. 2 rustic, and the fact that the work done was a fair, average job was declared immaterial. *Golden Gate Lumber Co. v. Sahrbacher* (1894) 105 Cal. 114, 38 Pac. 635.

The use of a kind of locks other than that required to be used in doors, and the substitution of Oregon fir for Mexican pine in porch columns, which did not affect their appearance, is not such a departure from the terms of the contract to build a house as to prevent its being considered as substantially performed. *Stewart v. Breckenridge* (1917) 69 Colo. 108, 169 Pac. 543.

Where the evidence showed that, by mistake, slightly wider clapboards were used in the gables of a house than were stipulated for, and that some of the boards used in the floors were wider than those called for, and that the usefulness and value of the house were not impaired thereby, and that the difference in the cost of using them instead of those called for in the contract was less than \$50, it was held that the trial court properly found that the contract had been substantially performed. *Healy v. Fallon* (1897) 69 Conn. 228, 37 Atl. 495.

Where it was expressly stipulated in the contract that the contractor was to use only "¾-inch beaded yellow pine first standard ceiling" and first and second grade "long-leaf yellow pine flooring, not over 3¼ inches wide," and he actually furnished a much less expensive and altogether different kind of pine ceiling and flooring, it was held not to be a substantial compliance with the contract, although the lumber furnished by him was as good and durable for that specific work, since it was the undoubted right of the owner of the building to recover damages for failure to furnish the kind of
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material specified, even though that used was in every respect equally as good. *Cannon v. Hunt* (1902) 116 Ga. 452, 42 S. E. 734.

If a builder is bound by his contract to use hard brick in the construction of the walls of a building, and uses any considerable number of soft brick, this is not a substantial compliance with the contract, so as to entitle him to recovery notwithstanding slight, unimportant deviations, omissions, or defects. *Robertson v. King* (1881) 55 Iowa, 725, 8 N. W. 665.

The contractor cannot recover on the theory of substantial performance where it appears that some of the articles supplied, such as a range, boiler, doors, and windows, were secondhand. *Conrad v. Loewer's Gambrius Brewery Co.* (1907) 107 N. Y. Supp. 94.

The jury are warranted in finding that a building contract is substantially performed although it appears that spruce instead of yellow pine horses were used to support the stairs, that the rail was fastened to the newel posts with nails instead of bolts, as required by the contract, and that flooring $\frac{3}{4}$ inches in thickness was used on the landing in the stairways instead of material $1\frac{1}{4}$ inches thick, where there was evidence that the spruce was used on account of being a better material for the purpose intended, and that the defendant was in no way prejudiced by the change, that the rail was nailed rather than bolted because it was impracticable to use bolts on account of the way in which the rail met the newel posts, and the thinner flooring on the stair platform was used to make it correspond with the flooring in the rest of the house, and the only difference in cost was \$1.50. *Snedaker v. Torpey* (1909) 41 Pa. Super. Ct. 312.

In *Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105, it was held that the failure of the contractor to use the materials specified in the construction of the plumbing, heating, and ventilating systems in a building, the contract price being \$27,332, did not preclude a finding that the contract had been substantially performed, where it appeared that the difference between the actual cost of the articles substituted and the actual cost of those specified was \$59.01, and the evidence showed that the contractor in many things substituted better and costlier material in place of the material specified, and that this additional cost was greater than the reduction in cost by the substitution of less expensive material, and that these departures from the specifications were due to the fact that it was, in some instances, difficult or impossible to obtain materials of the exact character specified, so that the contractor used such materials as could be had.

For other cases of failure to use the materials called for, see *Gustafson v. McGay* (1884) 12 Daly, 423; *Braseth v. State Bank* (1904) 12 N. D. 486, 98 N. W. 79, under heading "Masonwork;" *Cornish, C. & G. Co. v. Antrim Co-op. Dairy Assn.* (1901) 82 Minn. 215, 84 N. W. 724, under heading "Roof;" *Rischard v. Miller* (1920) 182 Cal. 351, 188 Pac. 50; *Smith v. Scott's Ridge School Dist.* (1850) 20 Conn. 312; *Anderson v. Peteret* (1895) 86 Hun, 600, 33 N. Y. Supp. 741; *Anderson v. Todd* (1898) 8 N. D. 158, 77 N. W. 20 B. R. C.

599, under heading "Miscellaneous;" *Smith v. Clark* (1886) 5 N. Y. S. R. 165, set forth in footnote 37, *infra*.

Painting and papering.

A finding that a contract for painting, graining, and varnishing houses has been substantially performed is consistent with a finding that "some places in the houses were not properly grained and finished." *Harlan v. Stufflebeem* (1891) 87 Cal. 508, 25 Pac. 686.

The painting and the papering of walls are not such defects as should be classed as substantial. *Brainard v. TenEyck* (1916) 102 Misc. 20, 168 N. Y. Supp. 116.

See also *Clark v. Collier* (1893) 100 Cal. 256, 34 Pac. 677, and *Coen v. Birchard* (1904) 124 Iowa, 394, 100 N. W. 48, under heading "Miscellaneous;" *Harlan v. Stufflebeem* (1891) 87 Cal. 508, 25 Pac. 686; *Manthey v. Stock* (1907) 133 Wis. 107, 113 N. W. 443, set out in footnote 33, *infra*.

Pipes and plumbing.

A contract for the installation of a water supply calling for "extra heavy" pipe, "of full weight and thickness suited for working pressure of 250 per square inch," is not substantially complied with by the installation of "standard" pipe of less thickness, but capable of resisting the required pressure. *W. B. Armstrong Co. v. State* (1919) 186 App. Div. 197, 173 N. Y. Supp. 786.

A building contract is substantially complied with although some of the piping used was not of the make specified, where it was used by inadvertence or mistake, and was of the same market value, the same weight per foot, the same thickness of walls, the same internal and external diameter, the same quality of galvanization, the same wearing qualities, and the same external appearance. *Jacob & Youngs v. Kent* (1921) 230 N. Y. 239, — A.L.R. —, 129 N. E. 889, affirming (1919) 187 App. Div. 100, 175 N. Y. Supp. 281.

A contract for the construction of a plumbing, steam-heating, and ventilating plant for the contract price of \$27,332.66, in a building costing \$186,000, may be deemed to have been substantially performed, where the remediable departures from the specifications may be corrected at an expense of \$99.21, and other departures, which cannot be remedied without a greater expense than their importance would justify, do not affect the usefulness of the system or impair its efficiency, serviceability, or durability, and the reduction in the value of the building by reason thereof, giving the owner the benefit of every doubt, is only \$2,180.88. *Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105. In reaching this conclusion, however, the supreme court seems to have been of the opinion that the preponderance of evidence showed that the value of the building was not in fact diminished.

For another instance in which a defect complained of was the failure to use the pipe specified, see *Rischard v. Miller* (1920) 182 Cal. 351, 188 Pac. 50, under heading "Miscellaneous."

As to the effect of neglect to put in lateral sewer and water connections, see *Hollister v. Mott* (1892) 132 N. Y. 18, 29 N. E. 1103.
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Plastering.

Where the specifications for the building of a house required plastering, without reference to any particular story or room, and without exception or exclusion of any particular portion of the building, and also required the construction of a chimney flue "in the east half of the basement," the contract cannot be said to have been substantially performed where the east room of the basement, an apartment 31 feet long by 12 or 13 feet wide, was never plastered, and no flue was ever built in that room. *Franklin v. Schullz* (1899) 23 Mont. 165, 57 Pac. 1037.

The fact that some clothes closets did not have three coats of plastering cannot be said, as a matter of law, to have been an intentional and substantial deviation. *Ramstedt v. Brooker* (1906) 113 App. Div. 45, 98 N. Y. Supp. 1044.

Roof.

A contract for the building of a creamery cannot be said to have been substantially performed where the contract required the construction of a building having a one-third pitch to the roof, and the pitch was 4 inches less, which would affect its capacity to shed rain, and a large portion of the shingles used upon the roof were not as prescribed, but were of a very inferior quality, and were not laid in a reasonable, suitable, and workmanlike manner, as required by the contract, but left many holes in the roof; also where the siding used in the construction of the building was not of as good a quality as required, but was unsound, cheap, and split, as a result of which there were a large number of holes in the sides of the building, through which the rain and snow would beat. *Cornish, C. & G. Co. v. Antrim Co-op. Dairy Asso.* (1901) 82 Minn. 215, 84 N. W. 724.

In *Oberlies v. Bullinger* (1892) 132 N. Y. 598, 30 N. E. 999, reversing (1890) 33 N. Y. S. R. 443, 11 N. Y. Supp. 264, where the only defect, according to the evidence, was that the ridge of the roof of a portion of a house was 5 inches lower than called for by the plan, which was caused by a mistake in the measurements, and which was not discovered until after the house was completed, and it appeared that this would not detract from the appearance of the building or render the roof any weaker, it was held that the granting of a nonsuit, on the ground that the plaintiff had not shown performance, was erroneous.

The failure of the contractor to put "saddle boards" on the ridge of the roof does not constitute a substantial deviation where the whole cost of doing so, including labor and material, would not exceed \$1. *McAdam v. Russell* (1910) 61 Wash. 176, 112 Pac. 345.

For another instance in which one of the defects complained of was the construction of the roof, see *Smith v. Scott's Ridge School Dist.* (1850) 20 Conn. 312; *Mason v. Griffith* (1917) 281 Ill. 246, 118 N. E. 18; *Woodward v. Fuller* (1880) 80 N. Y. 312, under heading "Miscellaneous."

Rubbish, failure to remove.

A contract to erect a building for \$3,500 was substantially performed. **10 B. R. C.**

formed although some brickwork was left unfinished, and the *débris* was not removed from some of the floors, whereby they could not be used, where it would cost only \$3 to complete the building in these respects. *Hahn v. Bonacum* (1906) 76 Neb. 837, 107 N. W. 1001, 109 N. W. 368.

That all the work of claning a cellar after the masonwork was completed was not finished was held immaterial in *Highton v. Dessau* (1892) 46 N. Y. S. R. 922, 19 N. Y. Supp. 395, affirmed in (1893) 139 N. Y. 607, 35 N. E. 203, so far as the payment of the fourth instalment of the contract price was concerned, where there was to be a fifth and final payment thirty days after the completion of the building, before which there would be ample time for removing the rubbish. The court said that substantial performance was sufficient, although a small and unimportant portion remained undone.

For another instance in which the failure to remove rubbish was held immaterial, see *Coen v. Birchard* (1904) 124 Iowa, 394, 100 N. W. 48, under heading "Miscellaneous."

Sidewalk.

A contract to build a sidewalk having a 4-inch concrete base with a three-quarter-inch wearing surface is not substantially performed by the construction of a sidewalk having a base of about 3 to 3½ inches in thickness and with a wearing surface of less than ¾ of an inch. *Richardson v. Investment Co.* (1913) 66 Or. 353, 133 Pac. 773.

Tile and marble work.

A finding of substantial performance of a contract for the tile flooring and marble wainscoting to be installed in a building for a contract price of upwards of \$30,000 cannot be said to be unsupported by the evidence where it appears that the installation of the work required the handling, setting, and joining of many thousands of pieces of material, which was soft, spongy, and easily nicked, that the damages sustained by the defendant as a result of the defects complained of amounted to \$469, and that the work as completed and taken as a whole was a first-class job of work and done in substantial conformance with the specifications, although some of the pieces of marble may not be in accordance with individual taste, some of the pieces of tiling not so closely joined as to accord with individual ideas as to workmanship, and in some cases small snips and nicks appear in the edges of pieces of tile or marble. *Joseph Musto Sons-Keenan Co. v. Pacific States Corp.* (1920) — Cal. App. —, 192 Pac. 138.

See also *George A. Fuller Co. v. B. P. Young Co.* (1903) 61 C. C. A. 245, 126 Fed. 343, set forth in footnote 37, *infra*.

Ventilators, omission of.

Failure on the part of a contractor for the erection of a small school building, to install ventilators, will not prevent his recovery as for substantial performance, the absence of the ventilators not

being a structural defect, and his refusal to install them not having been wilful and intentional, but due to the fact that one of the trustees who principally had charge of the erection of the schoolhouse said that he might omit putting them in. *Smith v. Russell* (1910) 140 App. Div. 102, 125 N. Y. Supp. 952, s. c. on subsequent appeal in (1911) 144 App. Div. 847, 129 N. Y. Supp. 461, which is affirmed without opinion in (1912) 207 N. Y. 644, 100 N. E. 1134.

Walls and foundations.

The jury are warranted in finding from the evidence that the deviations from the terms of the contract are so substantial that an allowance out of the contract price will not give the owner substantially what he has contracted for, where it appears that there was a crack in the wall of the building and that other parts were out of plumb, and that its settling was due to "water in the ground," where instead of porous drain tiling to convey away the waters in the soil about the foundation of the building, impervious tiling was used. *Hoglund v. Sortedahl* (1907) 101 Minn. 359, 112 N. W. 408.

A finding that there was no substantial performance of a contract for the construction of a schoolhouse is warranted by evidence that the foundation of the building was improperly and poorly constructed, in that the concrete was soft, and cracked, and the walls very irregular and out of plumb in places; that the rafters, ceiling, and joists had sagged and were not properly braced; that the floor had sagged some; that the frame at the plate line was very roughly thrown together, and not put in according to plans, letting the building spread; that the cornices were open and let the daylight in; that some of the wainscoting was out of plumb; and that the outside walls were not in plumb. *Kasbo Constr. Co. v. Minto School Dist* (1921) — N. D. —, 184 N. W. 1029.

In *Gilman v. Hall* (1839) 11 Vt. 510, 34 Am. Dec. 700, it was held that the contractors did not forfeit the right to recover for the building of a wall, because of the fact that they failed to build part of the whole wall quite as high as they had contracted to do. The court said that though the plaintiffs might not be able to recover on the special contract, not having specifically performed it on their part, still, according to the current of authority, they might recover on a *quantum meruit*. It did not appear that the plaintiffs' failure to build some portion of the wall quite as high as it ought to have been was from design. The defendant had the full benefit of their labor, and principles of common justice required that he should render an equivalent for the benefit received. The labor of the plaintiffs must, from the very nature of the case, be for the permanent benefit of the lands of the defendant, and could not in any way be made productive to the plaintiffs by a rescinding of the contract. The parties could not be placed *in statu quo*.

In *Clark v. Collier* (1893) 100 Cal. 256, 34 Pac. 677, it was held that a contract to repair an old house and build an addition there-
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to could not be said to have been substantially performed, so as to entitle the builder to a specific instalment of the contract price when the building should be completed "according to the agreement and specifications," where it appeared that no part of the second coat of paint upon the new part required by the contract had been put on; that the workbench of the carpenters and the paint for the second coat were in the new part at the time the contractor was prevented from completing his work by the destruction of the building by fire; that two of the doors were not hung; that there were no lock or fastenings on the front door, and no fastenings on the windows, and that the house had not been delivered to the owner.

A finding that the builder placed windows in a basement story some inches out of alignment with the windows in the upper story, and that this was unworkmanlike, is not a finding that the contract was not substantially performed, there being no plans or specifications saying where the windows should be placed, and it appearing the builder placed them so as to give the most furniture space in the room, and that the cost of resetting the windows was only \$5.50. *Schindler v. Green* (1906) 149 Cal. 752, 87 Pac. 626.

In *Dennis v. Walsh* (1891) 41 N. Y. S. R. 103, 16 N. Y. Supp. 257, the court was of the opinion that there had been a substantial compliance with the terms of a building contract where it appeared that, when the builders had finished their work, one of them went with a carpenter to the premises and there saw the owner, and offered to perform any work which the latter desired to have done in completion of the contract, and that he refused to point out or designate any work unfinished.

A contract to erect a building for the sum of \$3,565 is not substantially complied with where it is erected partly upon an adjacent public street and the cost of removing it therefrom would be \$660. *Herdal v. Sheehy* (1916) 173 Cal. 163, 159 Pac. 422.

A slight burning of the concrete in the foundation wall which can be removed at the cost of \$25; a slight settling of the floor around a pillar in one of the rooms which may be remedied for \$10; the use of pieces of glass in a cabinet door which are not of precisely the size specified in the contract and which may be changed for \$3.50; the use of half-inch water pipe where three-quarter inch was specified, shown to have been as serviceable in all respects as the pipe specified, and which may be changed for \$25; the use of No. 2 flooring, instead of No. 1, which was so clear of imperfections that the plaintiff himself did not discover it at the time, although present when it was being laid; the failure to put in a hat cupboard in one of the closets as called for by the specifications, which could have been put in for \$5, and a depression in the cement floor on the front porch which can be corrected for \$1—are not such defects as will preclude a recovery on the theory of substantial performance. *Rischarf v. Miller* (1920) 182 Cal. 351, 188 Pac. 50.

A finding that a contract has not been substantially performed must be reversed where the evidence shows that the defects com-

plained of are only as to the quality of the flooring, the banisters in the stairway, and the bottom step being nearer than the others. *Louthan v. Carson* (1917) 63 Colo. 473, 168 Pac. 656.

In *Smith v. Scott's Ridge School Dist.* (1850) 20 Conn. 312, it was held that the shape of the rafters of a school building, which were of round sticks, hewed only on one side, the contract calling for rafters 2½ by 4, of a certain length, and the neglect of the builder to groove the floor, and in lieu thereof battening it, might be overlooked as variations too small to be noticed, if it were found that the building was not injured in consequence thereof.

A dwelling is substantially completed on a specified date, so as to render the penalty provisions in the contract for failure to complete on that date inoperative, where there is nothing to be done except to clean up the rubbish on the outside, to remedy a slight defect in the cellar wall, and to make some changes in the windows, and to remedy some defects in painting and puttying, due to the condition of the weather, these defects in no way interfering with the occupancy of the house. *Coen v. Birchard* (1904) 124 Iowa, 394, 100 N. W. 48.

Where the builder's own evidence showed that the rails of the banisters of the building constructed by him seemed loose and defective; that the base and surbase were not so broad as they ought to be; and the owner's evidence showed that some parts of the work were not well done, that although parts of it were strong and plain, yet there was not a complete ranging of the banisters of the porch, and that the floor descended towards the house instead of in the opposite direction, so as to lead the water to rather than from the house,—it was held that an instruction that, if the jury should believe that the work was not done by the plaintiffs in a workmanlike manner, or in the manner specified in the covenant, then the plaintiffs could not recover in this action, should have been given. The court said that here there was a general performance according to the stipulation, agreeably to its general outlines, but that in the manner, or rather in the quality, of the performance proved as to part of the work, there was a failure. Was this such a failure as totally to preclude all recovery in the action? Would the failure to complete the work in a workmanlike manner in a small part thereof, when the greater part was well done, destroy forever the right of action on the contract, and leave the other side to enjoy the labor already well done? To answer these questions in the affirmative might, at first blush, seem rigid and severe. But still the court apprehended such an answer must be given, and the evils arising from this apparent rigor would be partially compensated by the preservation of good faith in performing special agreements. *Morford v. Mastin* (1828) 6 T. B. Mon. 610, 17 Am. Dec. 168.

Failure to install an adequate heating plant, to repair a leaky roof, to furnish screens for windows, electric lights in the basement, and to install ice-box drainage, will not prevent a contract from being regarded as substantially performed. *Mason v. Griffith* (1917) 281 Ill. 246, 118 N. E. 18.
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The finding of an auditor that a contract for the building of a barn was substantially performed "except the hanging of the large doors" cannot be said to show, as a matter of law, that the contract was not substantially performed. *Rose v. O'Riley* (1872) 111 Mass. 57.

In *Gillis v. Cobe* (1901) 177 Mass. 584, 59 N. E. 455, it was said that, so far as an omission of tie rods in a cement floor was concerned, the builders could probably have recovered the contract price on the ground that this detail was not a matter going to the essence of the contract, an exact compliance with it not being a condition precedent.

The performance of only 60 per cent of the contract by which the plaintiff agreed to raise and level a store building of the defendants, to furnish plank for footing a cellar sill, to square the cellar, stud and board it in, to put sill in the center of the store, and to replace the sidewalk as it was when the work began, the plaintiff failing to level the floor in a proper manner, is not such a substantial performance as will entitle him to recover, since the leveling of the building was the result sought by the defendants in entering into the contract. The raising of the building and the furnishing of the materials were merely incidental to the attainment of this object. *Anderson v. Pringle* (1900) 79 Minn. 433, 82 N. W. 682.

A building contract for \$2,850 cannot be said to have been substantially performed where, after the buildings contracted for were completed, the builder neglected to put in lateral sewer and water connections, which the owner afterwards caused to be put in at the expense of \$180. *Hollister v. Mott* (1892) 132 N. Y. 18, 29 N. E. 1103, reversing (1890) 32 N. Y. S. R. 743, 10 N. Y. Supp. 409.

That the roof and chimneys of a house were not well supported; that folding doors were not well hung, nor casings thereto well fastened; that the tar paper and clapboards in some few instances were not well put on; and that one door and casings were not fitted so that the door would shut; that the roof sagged, but seemed tight, which defect could be remedied by raising it and putting supports under it, which could be done without disturbing the other parts of the house or interrupting the use of it by the dwellers therein more than the occasional renewal of shingles would do, it being possible to carry out the contract for the roof simply, and at no great expense, were held not to show that the contract was not substantially performed, since these defects did not pervade the whole work, or make the object of the parties impossible or difficult of accomplishment. *Woodward v. Fuller* (1880) 80 N. Y. 312.

Where the plaintiff's contract was to furnish the tin roofing and the galvanized work, etc., of a freight shed, and to construct two gangway openings, at the contract price of \$3,259, and they did not make these openings, owing to an honest mistake in supposing the work was done, and it appeared that the cost of completing these openings would be about \$35, it was held that the finding that the contract had been substantially performed was correct. *Ringle v. Wallis Iron Works* (1896) 149 N. Y. 439, 44 N. E. 175.

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A referee's finding of substantial performance is not supported by a finding that failure to place bridging in certain places provided by the contract; failure to supply certain collar braces; failure to have girders of certain length and properly placed; failure to have trimmers and headers double instead of single, according to the contract; failure to put drawers and shelves in closets, pursuant to plans and specifications; failure to place wooden partitions on a brick wall in basement; and other small defects appearing in the building, proved to be due to any fault on the part of the builder,—could be remedied for \$50. *Spence v. Ham* (1898) 27 App. Div. 379, 50 N. Y. Supp. 960, affirmed in (1900) 163 N. Y. 220, 51 L.R.A. 238, 57 N. E. 412. The contract price in this case was \$3,900.

Failure to have girders of certain length and properly placed, and failure to place wooden partitions on a brick wall in the basement, are structural defects which affect the solidity of the building and tend to defeat the object of the contract, and are therefore deviations from the general plan of so essential a character that they cannot be remedied without partially reconstructing the building, and hence do not come within the rule of substantial performance with compensation for substantial omissions. *Spence v. Ham* (1900) 163 N. Y. 220, 51 L.R.A. 238, 57 N. E. 412, affirming (1898) 27 App. Div. 379, 50 N. Y. Supp. 960. The court said that the law was not satisfied by allowing the expense of the new girder, for instance, considered simply as a stick of timber of the right size; for the defective girder which partially supported the building must be removed and another put in its place in order to remedy the defect. While it might be possible to make the substitution, the process was quite apt to injure the structure, and hence the defect could not be regarded as unsubstantial.

Where there is not only a failure to make the ceiling of a building of a store of the height required by the contract, but where the cellar ceilings are in some places nearly 2 feet lower than the specifications required, where stone foundations and stone bottoms are omitted under the party walls, and where in many other respects the contract is not complied with, and the work omitted cannot be done except at great expense and with great risk to the building, there can be no recovery on the theory of substantial performance. *Flannery v. Sahagian* (1894) 83 Hun, 109, 31 N. Y. Supp. 360.

Where the foundations of a building were of less size than specified, and were constructed of inferior material, and the timbers in the frame of the building and in the partition were smaller than called for by the specifications, where the chimneys were out of plumb, floors and ceilings out of level, walls and cornices not square, doors, windows, and blinds defective and of poor material, and general defective work was the rule, and not compliance with the contract, and where in one important particular the plans and specifications were departed from to such an extent as to preclude the conclusion of performance, the specification providing that the contractor should put in footings of heavy rough stone under all founda-

tion walls, piers, posts, and chimneys, to be not less than 6 inches thick, and to project not less than 6 inches on all sides of the walls and piers, and there were footing courses under walls and chimneys, but they did not extend 6 inches beyond the walls, and the stones used were not as thick as called for by the specifications, and there was no ambiguity in the contract in this respect, and the defect was not one that could be remedied, it was held that the defects and omissions pervaded the whole job so as to prevent recovery on the theory of substantial performance. *Anderson v. Petereit* (1895) 86 Hun, 600, 33 N. Y. Supp. 741.

In *Pennsylvania Steel Co. v. Susswein* (1909) 132 App. Div. 659, 117 N. Y. Supp. 436, it was held that a contract to build a dock and to make the necessary fill inside of the curb from the upland, and to grade the remainder of said land from a certain highway to the dock, was substantially performed when the dock had been completed and the land above it had been filled in to the elevation of 5 feet, 5 inches, above low-water mark, which was about a foot above high-water mark, so as to enable the dock to be used, and the defendant's inspector had pronounced it to be fairly well leveled up.

The failure of a contractor undertaking extensive alterations and repairs in a building to put in a 6-inch plaster partition inclosing the stairs in the basement must be held to be immaterial and of such a slight or unsubstantial character as not to affect his right of recovery. *Meulenberg v. Coe* (1916) 160 N. Y. Supp. 581.

Breaches of a contract cannot be treated as light or inconsiderable or dismissed as merely technical where they not only go to the stability of the structure, but expose the building and those in it to the hazards of fire. *Witt v. Gilmour* (1916) 172 App. Div. 110, 158 N. Y. Supp. 41.

In *Anderson v. Todd* (1898) 8 N. D. 158, 77 N. W. 599, it was held that a building contract was not substantially complied with, and that therefore there could be no recovery upon it, where Milwaukee and Louisville, and not Yankton, cement was used; where the foundation wall did not taper up 6 feet from a 3-foot width at the bottom to 16 inches at the top, as required, but was blocked into a 16-inch wall 2 feet from the bottom, at a saving of 6,000 brick to the contractors; where the plate glass was not free from sand holes, and the front of the building was not properly constructed, and the contract was in other respects not complied with, and where the total deduction to be made from the contract price by reason of noncompliance with the contract was the sum of \$416.16, the total contract price being \$6,000.

See also *Cahill v. Heuser* (1896) 2 App. Div. 292, 37 N. Y. Supp. 736, under heading "Cesspools;" *Flannery v. Sahagian* (1894) 83 Hun, 109, 31 N. Y. Supp. 360; *Anderson v. Petereit* (1895) 86 Hun, 600, 33 N. Y. Supp. 741; and *Anderson v. Todd* (1898) 8 N. D. 158, 77 N. W. 599, under heading "Miscellaneous;" *Denoth v. Carter* (1913) 85 N. J. L. 95, 88 Atl. 835, and *Morton v. Harrison* (1885) 20 Jones & S. 305, set forth in footnote 37, *infra*.

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Although performance of the building contract does not depend, like the descriptive term "more or less," on the percentage of the contractor's shortcomings,³² the proportion that the value of the unfinished or defective work bears to the whole contract price has been taken in some cases as a basis for determining whether the contract has been substantially performed or not.³³

See also *Swain v. Seamens* (1870) 9 Wall. 254, 19 L. ed. 554, and *Bradford v. Whitcomb* (1895) 11 Tex. Civ. App. 221, 32 S. W. 571, set out in footnote 37, *infra*.

³² *Witt v. Gilmour* (1916) 172 App. Div. 110, 178 N. Y. Supp. 41.

Where a contractor contends that a building contract has been substantially completed, the importance of the uncompleted work is not to be tested by the proportion of its cost to the full contract price when, considered by itself, it was a material and substantial part of the work the contractor agreed to perform. *Errant v. Columbia Western Mills* (1915) 195 Ill. App. 14.

³³ Where a building contract amounts to \$18,700, and the value of uncompleted work is only \$2,274.92, or less than 5 per cent of the contract price, the owner, while entitled to credit for this sum, cannot refuse the payment of a balance of \$14,209.37, on the ground that the contract is not substantially complied with, while at the same time he has full possession, use, and enjoyment of the property. *Jefferson Hotel Co. v. Brumbaugh* (1909) 94 C. C. A. 279, 168 Fed. 867.

A building contract is substantially complied with where the claim of the owner for omitted and defective work, most of which was disputed by the contractors, was less than 3 per cent of the whole work represented by the contract price. *Caldwell v. Schmulbach* (1909) 175 Fed. 429, affirmed on another point in (1914) 131 C. C. A. 378, 215 Fed. 70.

Minor defects and departures from specifications in a house, the contract price of which was \$2,600, all of which could be made to conform to the contract at an expense of \$99.50 and which did not to any appreciable extent affect the use or value of the house as a dwelling place, will not prevent the contractor from recovering the contract price less the cost of remedying the defects complained of. *Rischard v. Miller* (1920) 182 Cal. 351, 188 Pac. 50.

The fact that the owner is entitled to an allowance of \$300 out of a contract price of \$3,130 on account of imperfections in the work does not necessarily show that the contract has not been substantially performed. *Collins v. Ramish* (1920) 182 Cal. 360, 188 Pac. 550.

A contract for the construction of a plumbing, steam heating, and ventilating plant in a building at a contract price of \$27,332 may be considered as having been substantially performed, where the remediable defects may be corrected at a cost of \$99.21, and the reduction in value of the building by reason of the defects which it is not practicable to remedy is \$2,180.88 and the total cost of the

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building was \$186,000. *Thomas Haverly Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105.

Where the contract price for work on a building, including materials, was \$200, a verdict that the builder did not fully perform his contract, and that \$25 should be deducted from the contract price by reason of his failure to perform it, and that the value of the labor performed and of the materials furnished was \$175, was held consistent with a finding that the builder attempted in good faith to perform his contract, and did substantially perform it. *Bergfors v. Caron* (1906) 190 Mass. 168, 76 N. E. 655.

In *Johnson v. DePeyster* (1872) 50 N. Y. 666, an allowance of \$150 for defective work was held not to be such as to show that the finding of substantial performance was unsustained by the evidence. What the contract price was does not appear in the report.

Where all the articles ordered on a building contract are delivered except some, not required, of the value of \$15, the contract is substantially performed. *Bradley v. Brennick* (1878) 18 Alb. L. J. 498.

It cannot be said that the fact that on an \$800 job the defects were of the value of \$75 is, as a matter of law, inconsistent with such a substantial compliance with the contract as the law requires to justify recovery. *Phillip v. Gullant* (1875) 62 N. Y. 256.

Where the contract price for carpenter work on a building was \$6,000, and the work could have been made to conform to the specifications for \$216.71, it was held that the amount of damages for want of strict performance was not such as necessarily to defeat the claim of substantial performance. Three judges dissented. *Crouch v. Gutmann* (1892) 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271, affirming (1890) 32 N. Y. S. R. 254, 10 N. Y. Supp. 275.

An allowance of \$380.20 for deviations from a \$12,650 building contract was held not to be such that the finding of a substantial performance was erroneous. *Anderson v. Meislahn* (1883) 12 Daly, 149.

In *Valk v. McKeige* (1891) 43 N. Y. S. R. 26, 16 N. Y. Supp. 741, a referee's finding of substantial performance of a \$7,000 job was upheld, although the amount allowed for defects was \$275, it being manifest that the contractor intended to fulfil.

Where the entire contract price of buildings was \$2,500, an allowance to the owner for defective construction and violation of the contract, together with the value of the work in completing the buildings left undone by the builders, amounting to the sum of \$876, or more than one third of the entire contract price, was held inconsistent with a finding of substantial performance. *Ketchum v. Herrington* (1892) 45 N. Y. S. R. 59, 18 N. Y. Supp. 429, affirmed in (1894) 144 N. Y. 633, 39 N. E. 493.

Where the cost of completion of an unfinished building contract of \$14,199 was, according to the builder's theory, more than \$1,000, and according to the owner's theory \$6,000, and the cost of replacing defective work was \$175, it was said that this would be no such sub-
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stantial compliance as, under the authorities, entitles the builder to recover the contract price less the amount required to complete the building: *Zimmermann v. Jourgensen* (1893) 70 Hun, 222, 24 N. Y. Supp. 170, affirmed in (1894) 144 N. Y. 656, 39 N. E. 859.

In *Monteverde v. Queens County* (1894) 78 Hun, 267, 28 N. Y. Supp. 918, where the contract price for the work was \$21,700, and the contract had been completed with the exception of some small matters which could be finished for \$154, it was held that a substantial performance of the contract had been shown.

Where the contract price was \$3,200, and the value of the unfinished and defective work was \$300, the court in *Anderson v. Petereit* (1895) 86 Hun, 600, 33 N. Y. Supp. 741, said that it was a subject of grave doubt whether a recovery could be sustained by the contractor on the theory of substantial performance.

A finding that the defects or the deficiencies amounted to 6 per cent of the original contract price was held in *Murphy v. Stickley Simonds Co.* (1894) 82 Hun, 158, 31 N. Y. Supp. 295, affirmed in (1897) 152 N. Y. 626, 46 N. E. 1149, not to be in conflict with a finding of substantial performance.

The accidental failure to complete brickwork to the extent of \$13.80 will not stand in the way of recovery on a building contract. *D'Andre v. Zimmermann* (1896) 17 Misc. 357, 39 N. Y. Supp. 1086, affirming (1896) 16 Misc. 499, 38 N. Y. Supp. 1121.

In *Cullen v. Gallagher* (1898) 28 App. Div. 173, 50 N. Y. Supp. 880, it was held that a finding that \$317 would be a reasonable allowance to make on a contract of work amounting to \$17,393 was a seeming answer to the contention that the contractor had failed substantially to perform his contract.

The work as done being worth one seventh less than it would have been had it been done in compliance with the terms of the contract, there is no substantial performance of the contract, so as to entitle the contractor to recover. *Mitchell v. Williams* (1903) 80 App. Div. 527, 80 N. Y. Supp. 864.

In *Excelsior Terra Cotta Co. v. Harde* (1904) 90 App. Div. 4, 85 N. Y. Supp. 732, where the contractor failed to perform his contract to the extent of upwards of 39 per cent of its value, it was held that he was not entitled to recover. In this case, however, an appeal was taken only from so much of the judgment of the lower court as allowed interest, and it was therefore held, to that extent, to have been erroneous. (The decision of the appellate division as to the allowance of interest is affirmed in (1905) 181 N. Y. 11, 106 Am. St. Rep. 493, 73 N. E. 494.)

Defects in work under a building contract cannot be said to have been inadvertent, which will necessitate an outlay of from \$3,500 to \$7,000 to remedy. *Nesbit v. Braker* (1905) 104 App. Div. 393, 93 N. Y. Supp. 856.

Upon a contract for carpenter work to the amount of \$2,100, where it appeared that the contractor put in only two out of sixteen new wardrobes,—a substantial omission, amounting to 10 per cent of his
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whole undertaking,—and that there were other omissions charged by the owner and disputed by the contractor, it was held that the contractor had failed to show substantial performance. *Lashinsky v. Silverman* (1905) 48 Misc. 501, 96 N. Y. Supp. 135.

The total deduction of \$200 for defects and omissions from the total original contract price of \$29,400, together with \$3,000 for extras, cannot be said to show, as a matter of law, that the contract was not substantially performed, so as to prevent the contractor from recovering on a complaint alleging performance. *Van Orden v. MacRae* (1907) 121 App. Div. 143, 105 N. Y. Supp. 600, affirmed in (1908) 193 N. Y. 635, 86 N. E. 1134.

In an action to enforce a mechanic's lien, where the contract was for the furnishing of certain ironwork of a building for \$2,000, and the work in connection with setting it up was insignificant, and it appeared that all of the material had been furnished, and the value of the labor unperformed was \$120, it was held that the contract was substantially performed. *Felgenhauer v. Haas* (1907) 123 App. Div. 75, 108 N. Y. Supp. 476.

Under ordinary circumstances a failure to perform 10 per cent of the contract price will not admit of the claim of substantial performance. *Rochkind v. Jacobson* (1908) 126 App. Div. 357, 110 N. Y. Supp. 583.

In *Rochkind v. Jacobson*, *supra*, it was held as a matter of law that where the contract price was \$3,100, and the owner was allowed \$314 for work which the contractors did not perform under the contract, there was not a substantial performance. In this case there were thirty-six fire-escape ladders and eight iron-bar cellar grates or doors not supplied and put in as required.

Where the work left undone exceeded in value \$1,200, it cannot be said to have been either slight or insignificant. *Mitchell v. Dunmore Realty Co.* (1908) 126 App. Div. 829, 111 N. Y. Supp. 322.

In *Fuchs v. Saladino* (1909) 133 App. Div. 710, 118 N. Y. Supp. 172, it was held that there could not be a substantial performance where the contractor failed to perform certain items of work of the aggregate value of \$5,385.33, or about 15 per cent of the value of the whole, regardless of whether the deficiencies constituted structural defects.

A verdict finding that the cost of remedying omissions and defects will be \$571.08 does not show as a matter of law, that a contract for an agreed price of \$28,800 has not been substantially performed. *Dinnie v. Lakota Hotel Co.* (1922) — N. D. —, 186 N. W. 248.

In *Chambers v. Jaynes* (1846) 4 Pa. 39, a \$2,000 building contract was held to have been substantially performed, where the cost of completion according to the plans was but \$106.

In *Ellis v. Lane* (1877) 85 Pa. 265, there was a finding that the greater part of the work of rebuilding a sawmill was substantially performed, but the court deducted for defects \$500 from the sum of \$5,000, agreed upon for the whole work. The court said that this
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finding, with the exception of the fact of substantial performance, was not assigned as error, and that, if it were, the court would not be justified in reversing unless it was shown to be manifestly wrong.

In *Windham v. Independent Teleph. Co.* (1904) 35 Wash. 166, 76 Pac. 936, it was held that an action to enforce a mechanic's lien would not be dismissed on the ground that it would take \$57.25 to complete the building, where the original contract price was \$3,850, and the contractors seasonably offered to complete any work that might be found incomplete, and to make such slight repairs or corrections as might be required.

Omissions amounting to \$508.80, on a contract for an agreed price of \$18,200, will not warrant interference with a finding that the contract has been substantially performed. *Finley v. Pew* (1922) — Wyo. —, 205 Pac. 310, rehearing denied in (1922) — Wyo. —, 206 Pac. 148.

A contract for a lump sum of \$1,850 may not be said, as a matter of law, not to have been substantially performed, where the defects for which deductions are made amount to \$90. *Fisher v. Cor* (1921) 54 N. S. 226, 57 D. L. R. 567.

In *Taylor Hardware Co. v. Hunt* (1917) 39 Ont. L. Rep. 85, 35 D. L. R. 504, it was held that a contract for the plumbing and heating of a building for the sum of \$5,982 was substantially performed, where the work undone was in regard to a radiator covering, the cost of which would not exceed \$5.

But in *Flaherty v. Miner* (1890) 123 N. Y. 382, 25 N. E. 418, affirming (1889) 15 Daly, 173, 4 N. Y. Supp. 618, the court said that where the contract was for \$3,500, and the jury allowed the owners \$600 for the expense of doing the work which the builder was bound to do under his contract, if it had appeared upon the trial without dispute that such a substantial portion of the work remained undone, and the objection had been taken, it might well be that the plaintiff could not have recovered upon the theory of substantial performance.

A contract to furnish and install certain machinery and equipment of the value of over \$9,000 may properly be found to have been substantially performed where it appears that the reasonable cost of remedying the defects would be \$100. *Toepfer v. Sterr* (1914) 156 Wis. 226, 145 N. W. 970.

Where the contractor agreed to furnish all material and labor in constructing a steam-heating plant, and to do the plumbing for \$1,400, and intended in good faith to comply with his contract, and the defects and omissions could be remedied for \$177.50, it was held that the cost of making the owner good was properly deducted from the contract price, and judgment properly given to the contractor for the balance. *Burgi v. Rudgers* (1906) 20 S. D. 646, 108 N. W. 253.

In *Hankee v. Arundel Realty Co.* (1906) 98 Minn. 219, 108 N. W. 842, a contract for a steam-heating plant for \$3,563 was held 10 B. R. C.

And the percentage of omitted work may, in and of itself, be sufficient to show that there has not been a substantial performance.³⁴

c. When question for jury.

While the question of substantial performance is ordinarily one of fact,³⁵ there are cases where the omissions or defects are so substantially performed, where the owner's damages for noncompliance were only \$33.

In *Otis Elevator Co. v. Dusenbury* (1905) 47 Misc. 450, 95 N. Y. Supp. 959, in holding that the contract for the installation of a steam-heating plant for \$621.77 was substantially performed, an allowance was made to the owner for work not strictly performed according to the contract, aggregating \$34.

The contract price for painting, finishing, and graining upon certain houses being \$145, and some of the work not having been properly done, a finding that the cost of properly finishing would be not more than \$5 was held to support a finding that the contract had been substantially performed. *Harlan v. Stuffeleem* (1891) 87 Cal. 508, 25 Pac. 686.

If the portion of the building defectively painted was one third of the whole, or if the cost of repainting would be one third of the contract price, the contract could not be held to have been substantially complied with. *Manthey v. Stock* (1907) 133 Wis. 107, 113 N. W. 443.

³⁴ *North American Wall Paper Co. v. Jackson Constr. Co.* (1915) 167 App. Div. 779, 153 N. Y. Supp. 204.

³⁵ UNITED STATES.—*Pitcairn v. Philip Hiss Co.* (1902) 113 Fed. 492, 51 C. C. A. 323; *Elizabeth v. Fitzgerald* (1902) 114 Fed. 547, 52 C. C. A. 321.

ARKANSAS.—*Fitzgerald v. La Porte* (1897) 64 Ark. 34, 40 S. W. 261.

CALIFORNIA.—*Conrad v. Foerst* (1921) — Cal. App. —, 201 Pac. 795.

CONNECTICUT.—*West v. Suda* (1897) 69 Conn. 60, 36 Atl. 1015, 1 Am. Neg. Rep. 578; *M. J. Daly & Sons v. New Haven Hotel Co.* (1916) 91 Conn. 280, 99 Atl. 853.

ILLINOIS.—*Bayer v. Hindley* (1906) 222 Ill. 319, 78 N. E. 626.

MINNESOTA.—*Snider v. Peters Home Bldg. Co.* (1918) 139 Minn. 413, 167 N. W. 108.

MISSISSIPPI.—*E. T. Burrowes Co. v. Crittenden* (1904) — Miss. —, 37 So. 504.

NEW JERSEY.—*Loh v. Broadway Realty Co.* (1908) 77 N. J. L. 112, 71 Atl. 112 (writ of error dismissed in (1909) — N. J. —, 74 Atl. 510); *Denoth v. Carter* (1913) 85 N. J. L. 95, 88 Atl. 835.

NEW YORK.—*Johnson v. DePeyster* (1872) 50 N. Y. 666; *Phillip v. Gallant* (1875) 62 N. Y. 256; *Glacius v. Black* (1872) 50 N. Y. 145, 10 Am. Rep. 449, s. c. subsequent appeal (1876) 67 N. Y. 563; 10 B. R. C.

tial and material as to require, in and of themselves, a conclusion as matter of law that the contract was not substantially performed, or where the same conclusion may be required by minor substantial defects which, though not large and substantial enough to show wil-

Woodward v. Fuller (1880) 80 N. Y. 312; *Nolan v. Whitney* (1882) 88 N. Y. 648; *Crouch v. Gutmann* (1892) 134 N. Y. 45, 30 Am. St. Rep. 609, 31 N. E. 271; *Rauscher v. Cronk* (1888) 21 N. Y. S. R. 529, 3 N. Y. Supp. 470; *Gibbons v. Russell* (1891) 37 N. Y. S. R. 402, 13 N. Y. Supp. 879; *Lewis v. Yagel* (1894) 77 Hun, 337, 28 N. Y. Supp. 833; *Monteverde v. Queens County* (1894) 78 Hun. 267, 28 N. Y. Supp. 918; *Murphy v. Stickley Simonds Co.* (1894) 82 Hun, 158, 31 N. Y. Supp. 295, affirmed in (1897) 152 N. Y. 626, 46 N. E. 1149; *Spence v. Ham* (1898) 27 App. Div. 379, 50 N. Y. Supp. 960, affirmed in (1900) 163 N. Y. 220, 51 L.R.A. 238, 57 N. E. 412; *Ramstedt v. Brooker* (1906) 113 App. Div. 45, 98 N. Y. Supp. 1044; *Ryan v. Voelkl* (1899) 26 Misc. 840, 56 N. Y. Supp. 1065; *Anderson v. Meislahn* (1883) 12 Daly, 149; *Gustareson v. McGay* (1884) 12 Daly, 423; *Hopper v. Cutting* (1891) 37 N. Y. S. R. 504, 13 N. Y. Supp. 820.

NORTH CAROLINA.—*Russell v. Iredell County* (1898) 123 N. C. 264, 31 N. E. 717.

NORTH DAKOTA.—*Dinnie v. Lakota Hotel Co.* (1922) — N. D. —, 186 N. W. 248.

PENNSYLVANIA.—*Sticker v. Overpeck* (1889) 127 Pa. 446, 17 Atl. 1100; *Pressy v. McCormack* (1912) 235 Pa. 443, 84 Atl. 427; *Morgan v. Gamble* (1913) 230 Pa. 165, 79 Atl. 410; *Snedaker v. Torpey* (1909) 41 Pa. Super. Ct. 312; *Beyer v. Mountz* (1914) 60 Pa. Super. Ct. 22.

SOUTH DAKOTA.—*Hulst v. Benevolent Hall Asso.* (1896) 9 S. D. 144, 68 N. W. 200.

In *Ketchum v. Herrington* (1892) 45 N. Y. S. R. 59, 18 N. Y. Supp. 429, affirmed in (1894) 144 N. Y. 633, 39 N. E. 493, an objection was made that a finding of substantial performance was a finding of fact, and not subject to exception; but the court said that the finding, though coming under the heading of conclusions of fact, was manifestly a mixed question of fact and law.

Where the evidence is such as to leave it in doubt or to be determined from conflicting evidence whether the performance of the contract was substantial, and whether any departure was material or merely trivial and inconsequential, it is for the jury to determine the facts by the standard of their own common sense and experience. *Nance v. Patterson Bldg. Co.* (1910) 140 Ky. 564, 140 Am. St. Rep. 398, 131 S. W. 484.

The question of substantial compliance is usually one for the jury where the contract is for remodeling and rebuilding of an old house. *Beyer v. Mountz* (1914) 60 Pa. Super. Ct. 22.

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ful and intentional omission in and of themselves, were nevertheless wilful and intentional as matter of fact.³⁶

In a recent New York case^{36a} it is said: "The question is one of degree, to be answered, if there is doubt, by the triers of the facts, and, if the inferences are certain, by the judges of the law."

Instances in which the question of substantial performance has been treated as one of fact may be found in the subjoined footnote.³⁷

³⁶ *Rochkind v. Jacobson* (1908) 126 App. Div. 357, 110 N. Y. Supp. 583.

Whether the party acted in good faith and whether the departures were material are generally questions for the jury, if the facts relating to the good faith of the plaintiff and the materiality of the changes or alterations are in dispute; but if the undisputed testimony shows a substantial variance not authorized by the owner, and made without his knowledge or assent, it is the duty of the court to so declare as a matter of law. *Pressy v. McCormack* (1912) 235 Pa. 443, 84 Atl. 427.

^{36a} *Jacob & Youngs v. Kent* (1921) 230 N. Y. 239, — A.L.R. —, 129 N. E. 889.

³⁷ In *Swain v. Seamens* (1870) 9 Wall. 254, 19 L. ed. 554, it was held not to be possible to decide, as a conclusion of law, that a sawmill 78 feet in width by 100 feet in length was a substantial compliance with an agreement which required that the mill to be constructed should be 50 feet in width by 150 feet in length. The court said that substantial performance, it was true, was all that was required to satisfy any such agreement, and it appeared also to be conceded that, in the adjudication of controversies growing out of building contracts, slight differences in dimensions between the building constructed and the terms of the contract might, in many instances, be overcome by a reasonable application of that rule; but the differences in the case before the court were far too great to fall within the principle, as the effect would be to make a new contract, and substitute it in the place of the stipulation executed by the parties.

Where the specifications called for "Blanco P. Carrara" marble for the wainscoting, and the architects supposed that they were calling for Blanco Puro, intending thereby to specify a pure white marble, but it clearly appeared in the course of the trial that "Blanco P." marble was "Blanco Poissant," the latter word being the name of a firm that owned certain quarries in Italy from which marble was produced, and that "Blanco P." was understood by the importing trade generally to mean the marble from these and neighboring quarries in a limited district, having well-known characteristics of color and structure, but not being of pure white, having a pearly or slightly bluish color, and being comparatively, although not wholly, free from veins, showing some cloudiness of background, and being of fine grain and susceptible of high polish; and it further appeared that the subcontractor furnished a good quality of this marble, but that the architects were dissatisfied with much of it, because it did

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It has been held that where the evidence is undisputed as to the work left undone and the contractor claims substantial performance of the contract, the question of substantial compliance becomes a question of construction of the contract, which is for the court.³³

IV. Measure of recovery.

Although proof of substantial performance will permit a recovery not conform to their standard of pure white, and because they regarded many of the slabs as not well matched,—it was held that the question whether the contractor had substantially complied with the contract was for the jury. *George A. Fuller Co. v. B. P. Young Co.* (1903) 126 Fed. 343, 61 C. C. A. 245.

In *Denoth v. Carter* (1913) 85 N. J. L. 95, 88 Atl. 835, it was held to be a question of fact for the trial court whether the substitution of a drain at the bottom of the footing course for a blind drain as required by the specifications was such a substantial defect as to bar a recovery of the contract price subject to an allowance to the owner for the difference in value, if any.

In *Morton v. Harrison* (1885) 20 Jones & S. 305, where a brick wall had not been carried to the top of the basement floor joists, as required by the plan, but only to the underside of the girder on which the floor beams of the basement floor rested, the question whether the contract had been substantially complied with, there being testimony that it would have been unsafe to have carried the wall as high as the plans called for, was held properly submitted to the determination of the jury.

In *Smith v. Clark* (1886) 5 N. Y. S. R. 165, where the contractor substituted basswood for pine in the ceiling of a schoolhouse, under the supposition that a trustee had authorized him to do so, it was held to be a question for the jury to say whether, although the defendant had not consented to the change, the use of basswood for the ceiling was a substantial compliance with the contract, the plaintiff intending in good faith to perform the contract.

In *Rush v. Wagner* (1890) 34 N. Y. S. R. 798, 12 N. Y. Supp. 2, it was held to be for the jury to say whether the knotty condition of a floor was a slight and trivial violation of a contract requiring the floors of a building to be laid "smooth and level and free from knots," or whether it was such a material violation thereof as would lead them to conclude that the builder had not substantially performed his contract.

In *Bradford v. Whitcomb* (1895) 11 Tex. Civ. App. 221, 32 S. W. 571, it was held on rehearing that where the question whether a building contract, which had been completed except for the cutting of a door, which was not done because of a protest of the owner's tenant, was substantially performed, was submitted to the jury, a verdict in favor of the plaintiff on that issue would not be disturbed.

³³ *Errant v. Columbia Western Mills* (1915) 195 Ill. App. 14.
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in an action on the contract, it is not the full contract price that can be recovered,³⁹ and an instruction which permits the jury to award the full price in case they find the contract to have been substantially performed is erroneous.⁴⁰ Nor can the contractor recover according to the actual value of the work as if there had been no special contract.⁴¹ The true measure of recovery is the sum stipulated in the agreement, less the damages sustained by the failure strictly to perform.⁴²

³⁹ It is neither reasonable nor lawful that the plaintiff should be permitted to recover the entire contract price on a mere substantial performance unless it is found that defendant has accepted the work and thereby waived a full performance. *Morris v. Hokosona* (1914) 26 Colo. App. 251, 143 Pac. 826.

The contractor will not be permitted to recover the entire amount of the contract for mere substantial and not literal performance, but must submit to a deduction to the extent of the breach according to the contract. *United Iron Works Co. v. Wagner* (1916) 89 Wash. 293, 154 Pac. 460.

⁴⁰ *Estep v. Fenton* (1872) 66 Ill. 467; *Keeler v. Herr* (1895) 157 Ill. 57, 41 N. E. 750; *Chicago Athletic Assn. v. Eddy Electric Mfg. Co.* (1898) 77 Ill. App. 204; *Monocacy Bridge Co. v. American Iron Bridge Mfg. Co.* (1877) 83 Pa. 517; *Moore v. Carter* (1892) 146 Pa. 492, 23 Atl. 243.

⁴¹ *Thornton v. Place* (1832) 1 Moody & R. 218; *Hayward v. Leonard* (1828) 7 Pick. 181, 19 Am. Dec. 269.

⁴² *Mitchell v. Caplinger* (1911) 97 Ark. 278, 133 S. W. 1032; *Thomas v. Jackson* (1912) 105 Ark. 353, 151 S. W. 521; *Roseburr v. McDaniel* (1921) 147 Ark. 203, 227 S. W. 397; *Thomas Haverly Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105; *Cook v. American Luxfer Prism Co.* (1901) 93 Ill. App. 299; *Etna Iron & Steel Works v. Kossuth County* (1890) 79 Iowa, 40, 44 N. W. 215; *Lofsted v. Bohman* (1913) 88 Kan. 660, 129 Pac. 1168; *Vincennes Bridge Co. v. Walker* (1918) 181 Ky. 651, 205 S. W. 778; *Cullen v. Sears* (1873) 112 Mass. 299; *Wagner v. Allen* (1899) 174 Mass. 563, 55 N. E. 320; *Jacob & Youngs v. Kent* (1921) 230 N. Y. 239, — A.L.R. —, 129 N. E. 889; *Ryan v. Voelkl* (1899) 26 Misc. 840, 56 N. Y. Supp. 1065; *Vogel v. Friedman* (1901) 34 Misc. 775, 68 N. Y. Supp. 820; *Mitchell v. Dunmore Realty Co.* (1908) 126 App. Div. 829, 111 N. Y. Supp. 322; *Kasbo Constr. Co. v. Minto School Dist.* (1921) — N. D. —, 184 N. W. 1029; *Kane v. Stone Co.* (1883) 39 Ohio St. 1, affirming (1879) 4 Ohio Dec. Reprint, 509; *Edmunds v. Welling* (1910) 57 Or. 103, 110 Pac. 533; *United Iron Works v. Wagner* (1916) 89 Wash. 293, 154 Pac. 460; *Walsh Constr. Co. v. Cleveland* (1920) 271 Fed. 701; *Canadian Western Foundry & Supply Co. v. Hoover* (1917) 13 Alberta L. R. 347, [1917] 3 West. Week. Rep. 594, 37 D.L.R. 285; *Diebel v. Stratford Improv. Co.* (1917) 38 Ont. L. Rep. 407, 33 D. L. R. 296.

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The effect of the contract is to make the contract price the measure of the value of the work if done according to its terms,⁴³ and the benefit received for which the owner should pay on the basis of the contract is to be ascertained by deducting from the contract price the damages occasioned by the builder's failure fully to perform.⁴⁴

These are, ordinarily, the expense of making the work conform to the requirements of the contract.⁴⁵

The reasonable value for which recovery may be had in cases of substantial performance of building contracts is to be ascertained with reference to the contract price and by deducting from that price such sum as ought to be allowed for the omissions and variations. *M. J. Daly & Sons v. New Haven Hotel Co.* (1916) 91 Conn. 280, 99 Atl. 853.

In *Kelly v. Bradford* (1860) 33 Vt. 35, it was said that the party failing to perform could recover only such a sum as his labor had benefited the other party. Had he strictly and literally kept his agreement he would have been entitled to the contract price. Failing in this, first, he must deduct from the contract price such a sum as would fully compensate him for the imperfection in the work and the insufficiency of materials, so that he should in this respect be made as good, pecuniarily, as if the contract had been strictly performed; second, the party failing to perform must also deduct from the contract price whatever additional damages his breach of the contract might have occasioned to the other. In many cases these damages would be considerable; in others they might be nothing. It was only by considering both of these elements that the benefit which one might have derived from the labor of the other could be ascertained when measured by the contract and the contract price. Deduct all these damages from the contract price, and the remainder was the benefit which the owner derived from the part performance of the contract.

⁴³ *Morford v. Ambrose* (1830) 3 J. J. Marsh. 690.

⁴⁴ *H. DAKIN & Co. v. LEE* (reported herewith) *ante*, 700; *Danforth v. Freeman* (1898) 69 N. H. 466, 43 Atl. 621.

⁴⁵ ENGLAND.—*Thornton v. Place* (1832) 1 Moody & R. 218; *Cutler v. Close* (1832) 5 Car. & P. 337.

CANADA.—*Canadian Western Foundry & Supply Co. v. Hoover* (1917) 13 Alberta L. R. 347, [1917] 3 West. Week. Rep. 594, 37 D. L. R. 285; *Diebel v. Stratford Improv. Co.* (1917) 38 Ont. L. Rep. 407, 33 D. L. R. 296.

ARKANSAS.—*Mitchell v. Caplinger* (1911) 97 Ark. 278, 133 S. W. 1032; *Thomas v. Jackson* (1912) 105 Ark. 353, 151 S. W. 521; *Roseburr v. McDaniel* (1921) 147 Ark. 203, 227 S. W. 397.

CONNECTICUT.—*M. J. Daly & Sons v. New Haven Hotel Co.* (1916) 91 Conn. 280, 99 Atl. 853.

GEORGIA.—*Small v. Lee* (1908) 4 Ga. App. 395, 61 S. E. 831.

ILLINOIS.—*Keeler v. Herr* (1895) 157 Ill. 57, 41 N. E. 750; 10 B. R. C.

Palmer v. Meriden Britannia Co. (1900) 188 Ill. 508, 59 N. E. 247; *Mason v. Griffith* (1917) 281 Ill. 246, 118 N. E. 18; *School Directors v. Roberson* (1896) 65 Ill. App. 298; *Shepard v. Mills* (1897) 70 Ill. App. 72, affirmed in (1898) 173 Ill. 223, 50 N. E. 709; *Cook v. American Luxfer Prism Co.* (1901) 93 Ill. App. 299.

INDIANA.—*Springer v. Jones* (1919) — Ind. App. —, 123 N. E. 816.

KANSAS.—*McCullough v. S. J. Hayde Contracting Co.* (1910) 82 Kan. 734, 109 Pac. 176; *Lofsted v. Bohman* (1913) 88 Kan. 660, 129 Pac. 1168.

MASSACHUSETTS.—*Veazie v. Hosmer* (1858) 11 Gray, 396.

MICHIGAN.—*Gutov v. Clark* (1916) 190 Mich. 381, 157 N. W. 49.

MINNESOTA.—*Snider v. Peters Home Bldg. Co.* (1918) 139 Minn. 413, 167 N. W. 108.

NEW HAMPSHIRE.—*Danforth v. Freeman* (1898) 69 N. H. 466, 43 Atl. 621.

NEW JERSEY.—*Dyer v. Lintz* (1908) 76 N. J. L. 204, 68 Atl. 908; *Porter Screen Mfg. Co. v. United Contractors' Corp.* (1910) 80 N. J. L. 115, 77 Atl. 473; *Anderson v. Odd Fellows Hall Asso.* (1913) 84 N. J. L. 176, 86 Atl. 367.

NEW YORK.—*Jacob & Youngs v. Kent* (1921) 230 N. Y. 239, — A.L.R. —, 129 N. E. 889; *Crouch v. Gutmann* (1892) 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271; *Holl v. Long* (1901) 34 Misc. 1, 68 N. Y. Supp. 522; *New York Metal Ceiling Co. v. City Homes Improv. Co.* (1904) 88 N. Y. Supp. 233; *Frank v. Mandel* (1907) 107 N. Y. Supp. 116; *Greenberg v. Lumb* (1911) 129 N. Y. Supp. 182; *Olney v. Daniel Birdsall & Co.* (1915) 151 N. Y. Supp. 907; *Along-The-Hudson Co. v. Ayres* (1915) 170 App. Div. 218, 156 N. Y. Supp. 58.

NORTH DAKOTA.—*Kasbo Constr. Co. v. Minto School Dist.* (1921) — N. D. —, 184 N. W. 1029.

OKLAHOMA.—*Stewart v. Riddle* (1919) 76 Okla. 70, 184 Pac. 443.

OREGON.—*Gove v. Island City Mercantile & Mill. Co.* (1888) 16 Or. 93, 17 Pac. 740; *Edmunds v. Welling* (1910) 57 Or. 103, 110 Pac. 533.

PENNSYLVANIA.—*Wade v. Haycock* (1855) 25 Pa. 382; *Sticker v. Overpeck* (1889) 127 Pa. 446, 17 Atl. 1100; *Moore v. Carter* (1892) 146 Pa. 492, 23 Atl. 243.

UNITED STATES.—*Walsh Constr. Co. v. Cleveland* (1920) 271 Fed. 701.

In *Otis Elevator Co. v. Flanders Realty Co.* (1914) 244 Pa. 186, 90 Atl. 624, it is said that no hard and fast rule as to the nature of damages allowable to the owner can be laid down; that when the rule applied is the cost or expense of making the alterations or repairs necessary to conform to the contract, the general rule—the difference between the actual value of the article accepted and its value if

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In those jurisdictions, however, in which the doctrine of recovery for substantial performance is extended to cases in which the defects may be remedied only by taking down and doing over some substantial portion of the work, the amount allowed is the amount which the building is worth less, by reason of the defects, than it would have been if constructed in entire conformity to the contract,⁴⁸ even though such difference in value may be negligible.⁴⁹

constructed according to contract—must be shown to be impracticable, and not a fair measure of the damages sustained.

Where there is a substantial performance the owner's measure of damages is the reasonable cost of remedying the defects, and not the difference in value between the house as it was and as it should have been. *Snider v. Peters Home Bldg. Co.* (1918) 139 Minn. 413, 167 N. W. 108; *Anderson v. Odd Fellows Hall Asso.* (1913) 84 N. J. L. 176, 86 Atl. 367; *Stewart v. Riddle* (1919) 76 Okla. 70, 184 Pac. 443; *Graves v. Allert* (1912) 104 Tex. 614, 39 L.R.A.(N.S.) 591, 142 S. W. 869.

Where a contract to build a house has been defectively performed, in that the roof leaks, the cement floor in the basement is of poor quality, the steps are crooked, the mantel not level, etc., the measure of damages is the reasonable cost of altering the defects in parts of the house so as to make it conform to the plans and specifications, and not merely the difference between the value of the house as it is and what its value would have been if constructed according to contract. *Springer v. Jones* (1919) — Ind. App. —, 123 N. E. 816.

In *Foeller v. Heintz* (1908) 137 Wis. 169, 24 L.R.A.(N.S.) 327, 118 N. W. 543, it is said that the rule of damages by which the measure of the proprietor's loss on the substantial performance of the building contract may be ascertained is the reasonable cost of remedying the defects which can be practically remedied so as to make the structure exactly conform to the agreement, and the difference between the value of the structure so completed and one like the building agreed upon.

If the defect can be remedied without great sacrifice of work and material already wrought into the building, the reasonable cost of correcting the defect should be allowed; if otherwise, the diminished value of the building on the basis of the contract price, by reason of the defect. *Buchholz v. Rosenberg* (1916) 163 Wis. 312, 156 N. W. 946; *Burmeister v. Wolfgram* (1921) — Wis. —, 185 N. W. 517.

The measure of damages for failure to comply strictly with a millwright contract would be the expense of the new work necessary to comply with the contract, and the profits of the mill for such time as it was necessary to stop running whilst the alterations were being made. *Wade v. Haycock* (1855) 25 Pa. 382.

⁴⁸ Where a building contract has been substantially performed, the measure of damages to be allowed to the owner by reason of the contractor's failure to conform to specifications as to quality
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of lumber and manner of nailing in constructing a staircase is merely the amount of detriment suffered by the owner by reason of breaches of the contract, and not the cost of building a new staircase,—especially where the payment was to be made before the commencement of the work, and is therefore to be regarded as an independent promise. *Carpenter v. Ibbetson* (1905) 1 Cal. App. 272, 81 Pac. 1114.

Where the defects are remediable, the damage is properly measured by the reasonable cost of correction; for defects which cannot be corrected without a disproportionate expense, the damages are properly measured by the difference between the value of the building with those imperfections, and its value without them. *Thomas Havery Co. v. Jones* (1921) 185 Cal. 285, 197 Pac. 105.

In an action to recover for work and materials furnished in the erection of a church edifice, where it appears that the ceiling is 2 feet lower than the contract calls for, that the seats are narrower than the specifications call for, and that there are other variations and omissions, that the mistake in the height of the ceiling is due to the combined error of the plaintiff and the defendants' architect, and that the other changes are due to the omissions of the plaintiff and his workmen, that the plaintiff, in doing the work and furnishing the materials, acted in good faith, and that the building as completed is reasonably adapted to the wants and requirements of the defendants, and its use beneficial to them, and that it would be practically impossible to make the building conform to the contract without taking it partially down and rebuilding it, the defendants are not entitled to deduct from the contract price as damages the sum it would cost to make the building conform to the contract, but it is proper to deduct only the amount of the diminution in the value of the building by reason of the plaintiff's deviation from the contract. *Pinches v. Swedish E. L. Church* (1887) 55 Conn. 183, 10 Atl. 264.

In the determination of the amount of deduction which ought to be made in the application to specific cases of the general rule, regard must be had to the circumstances which each present. A different method is required to accomplish the ends of justice where the shortcomings are such as may be remedied and completion according to the contract had without substantial interference with the structure of the building, than where the remedy and completion involve substantial structural changes. In the first case the approved method under ordinary conditions is to deduct from the contract price such sum as it would cost to make the work comply with the contract. In the latter case, the amount of deduction may be measured by the diminished value of the building to the owner by reason of the defects. In any case the deduction is to be so determined that the owner's resultant payment will be fair and reasonable compensation, with reference to the contract price, for what of value to him he has received, and no more, and that the contractor shall receive a fair reward determined by the contract standard for the

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benefit conferred by him in his attempt to execute the contract. *M. J. Daly & Sons v. New Haven Hotel Co.* (1916) 91 Conn. 280, 99 Atl. 853.

In *Small v. Lee* (1908) 4 Ga. App. 395, 61 S. E. 831, the court said that where the defects in a house as constructed might be remedied at a reasonable expense, it would be proper to deduct from the contract price the sum which it would cost to complete it according to the requirements of the plans and specifications. If the contractor had built a structure substantially adapted to the purpose for which it was built, and of which the owner was in the use and enjoyment, but the defects were such that the structure could not be made to conform strictly to the requirements of the contract, except by an expenditure which would deprive the contractor of adequate compensation for his labor and materials, justice and equity would require the adoption of another measure of damages. In the case at bar, the builder, owing to the misconstruction of the plans, built the rooms and veranda smaller than he should have done. The court declared that, in such a case, the true measure of damages would be the difference between the value of the house as finished and the house as it ought to have been finished. To require that the house should be rebuilt, and that the contractor should pay the cost of rebuilding, or that the estimated cost of making the house conform to the contract should be allowed as damages, would be to give an unconscionable advantage to the owner, and would deprive the contractor of adequate compensation for his work and materials.

The difference in the market value of the entire premises with the house as constructed, and their value with the house as it should have been constructed, applies only where the house has been located on a different part of the lot than it should have been according to the contract. *Ibid.*

Where a house is not located as required by the plan, being about 1 foot out of place, the owner's measure of damages is not the expense of moving the house to the line shown in the plan, but the difference in value of the property as it is and as it would have been if the house had been set according to the plan. *Olsen v. Henderson* (1906) 113 App. Div. 676, 99 N. Y. Supp. 917.

In *Taulbee v. Moore* (1899) 106 Ky. 749, 51 S. W. 564, it was held that where the defect complained of was the contractor's failure to execute brickwork so that the inside of a wall should be as smooth as the outside, the proper measure of damages which might be set off against the contract price was the difference, if any, between the value of the building as constructed, and what it would have been if it had been constructed according to the contract, and not the cost of taking away the wall and replacing it by a wall conforming to the contract requirements, the court saying: "We do not think the measure of damages contended for by appellant is a sound or just one. . . . If appellant is right in his theory, appellee might be mulcted in damages in a sum equal to the entire contract price agreed to be paid to him for the job of work, on account of a com-

paratively inconsequential failure to literally comply therewith, and which did not affect the real value of the work done by him. Whilst it may be true that if a contractor should disregard the plans and specifications under which a building was to be erected, and erect one substantially dissimilar, the owner might refuse to receive or pay for the property, but where there has been, as in this case, a substantial compliance, it seems to us that the true criterion of damages is that laid down by the court."

In *Gleason v. Smith* (1852) 9 Cush. 484, 57 Am. Dec. 62, it was held that an instruction that if a builder of a dam has substantially performed, he may recover so much as his work and labor were worth to the owners, would be erroneous if standing alone, but was correct where the jury was directed to arrive at the result by deducting from the contract price so much as the dam built was worth less than the dam contracted for. The court said that the rule for making the deduction from the contract price for the deficiency in the work had been sometimes sought in another form; that the jury should take as the basis of the calculation the contract price, and deduct from that sum such amount as would be required to be paid to complete the work according to the contract; that probably the result would be much the same under either of these rules. In many cases the latter rule would not be adapted to the case, as where the building was wholly finished but there was some small departure from the contract in some of the details; there the rule must be to deduct so much from the contract price as the work was worth less to the owner.

An instruction to the jury that, if a house was not built pursuant to contract, they should consider what the house was worth to the owner, and to give that sum in damages, is incorrect, since they should be instructed to deduct so much from the contract price as the house is worth less on account of the departures. *Hayward v. Leonard* (1828) 7 Pick. 181, 19 Am. Dec. 269.

When in an action on contract upon an account annexed, the plaintiff seeks to recover payment for building a house according to a special contract, and proves that he has substantially performed it except in some comparatively slight deviations, the measure of damages is the contract price, deducting what the house is worth less to the defendant by reason of such deviations. *Cullen v. Sears* (1873) 112 Mass. 299.

In *Wagner v. Allen* (1899) 174 Mass. 563, 55 N. E. 320, an instruction that a contractor substantially performing can recover the contract price less such sum as will compensate the owner for the difference in value between the work as it is and the work as it would have been if the contract had been properly performed was approved.

Although the true measure of damages where the action will not lie upon the contract is the additional value of the land of the defendant by reason of the labor performed and materials furnished by the plaintiff, yet this value may in many cases be ascertained by deducting from the contract price what the house was worth less to the

defendant by reason of the deviations from the contract. *Norwood v. Lathrop* (1901) 178 Mass. 208, 59 N. E. 650.

Where the defects in construction are of such a character as cannot reasonably be remedied so as to make the work correspond exactly to the specifications of the contract, there should be deducted from the contract price the amount by which the value of the house as constructed fell short of what that value would have been if the contract had been exactly performed, rather than the amount necessary to remedy any deficiency in the performance of the contract. *Pelatoski v. Black* (1913) 213 Mass. 428, 100 N. E. 831.

Where the contract is substantially complied with, and the building is such a one as is adapted for the purpose for which it was constructed, and only slight additions or alterations are required to finish the work according to the contract, the defects being remediable at a reasonable expense and without interfering with the rest of the structure, the measure of damages is such a sum as is necessary to make the building conform to the plans and specifications. But where the defects are such that they cannot be remedied without the entire demolition of the building, and the building is worth less than it would have been if constructed according to the contract, the measure of damages is the difference between the value of the building actually built and the reasonable value of that which was to have been built. *Gulov v. Clark* (1916) 190 Mich. 381, 157 N. W. 49.

The owner is entitled to a deduction of the difference between the value of the building actually tendered and that contracted to be built, even if the building would be worth more when completed according to the contract than the contract price. *Pierson v. Smith* (1920) 211 Mich. 292, 178 N. W. 659.

The measure of damages where a building is substantially and yet defectively completed is the difference between the value of the building and the reasonable cost or value of the building completed in accordance with the requirements of the contract. *Simons v. Wittmann* (1905) 113 Mo. App. 357, 88 S. W. 791.

The owner is entitled to the cost of correcting any bad work done by the contractor so far as it can reasonably be corrected, and to the fair value of the damage done to him where it cannot be reasonably replaced. *Danforth v. Freeman* (1898) 69 N. H. 466, 43 Atl. 621.

Where the changing of the building to conform to specifications would involve the destruction of so much work already done, and the doing of so much work not originally contemplated by the parties, that such an inquiry could not be any reliable aid to the jury in ascertaining the difference between the value of the building in its defective condition and what would have been its value if no defect had existed, there is no error in a refusal to charge the jury that if they found the contract to have been substantially performed, they must allow the owner such an amount as would be necessary to make the building conform to the specifications; but the true rule of damages is the difference in value between the building as in fact finished and as it would have been had the provisions of the contract been accu-
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rately carried out. *Morton v. Harrison* (1885) 20 Jones & S. 305.

Where the action was on a contract for the building of a water tower and tank, it was held that the proper finding was not the amount of money it would take to make such tower and tank conform to the specifications, but the diminished value of said tower and tank, by reason of the failure to conform to the specifications. *Madisonville v. Rosser* (1906) 8 Ohio C. C. N. S. 387.

The proper rule for measuring the recoverable difference between substantial and complete performance of a building contract is not necessarily the cost of tearing down the defective work and rebuilding it so as to conform to the contract. It is the reasonable cost of remedying defects so far as that can be done practically, and the diminished value of the building so completed, because of defects not so remediable. *Ashland Lime, Salt & Cement Co. v. Shores* (1899) 105 Wis. 122, 81 N. W. 136. A sentence used by the court in connection with the foregoing statement of the rule of damages: "As to any defect that may be suggested, if the cost of remedying it will exceed the diminished value of the structure in a material degree, the latter is the true measure of liability of the builders,"—which, read literally and without reference to the context, would violate the general principle running through all the cases, that the proprietor is entitled to the very thing contracted for, or its equivalent,—is explained in *Foeller v. Heintz* (1908) 137 Wis. 169, 24 L.R.A. (N.S.) 327, 118 N. W. 543, as referring only to imperfections requiring substantial destruction of the material parts of a building created according to contract, and a beginning over again, in order to remedy the defects.

Where the deviation complained of is that a felt or asphalt paper roof has been put on, instead of a tar and gravel roof, the proper measure of damages is the expense of a new gravel roof, since the substitution will not involve any reconstruction of the building, or great sacrifice or inwrought material; but in the case of a defective floor, the measure of damages is the diminished value of the building. *Buchholz v. Rosenberg* (1916) 163 Wis. 312, 156 N. W. 946.

In an action on a contract to construct an elevator, shown to have been substantially although not exactly performed, in which it appears that it would cost a great deal more to reconstruct or adjust it so as to conform to the contract than would be warranted by any benefit to be derived in making the alterations, the amount of deduction to which the owner is entitled is the difference between the actual value of the elevator and what its value would have been if it had been constructed in exact compliance with the contract. *Otis Elevator Co. v. Flanders Realty Co.* (1914) 244 Pa. 186, 90 Atl. 634.

In *Walsh Constr. Co. v. Cleveland* (1920) 271 Fed. 701, it is said: "In cases of this character, two rules have been applied, depending somewhat upon the circumstances of each case. One is that the contractor is entitled to recover the contract price, diminished by the difference between the value of the building to the owner in its de-

The statement made in one case,⁴⁷ that the amount of the allowance should be what the building is worth less, by reason of the defects, than the contract price, seems, in view of other decisions by the same court, to have been made by inadvertence. In some cases, however (as in the case of a contract for the construction of an elevator: *Otis Elevator Co. v. Flanders Realty Co. supra*), the contract price must, *ex necessitate*, be taken as the measure of the value of the work if completed according to contract.

While the rule that the owner is entitled to an allowance of the difference between the value of the work as it is and its value as it would have been if the contract had been properly performed operates justly enough where the work contracted to be done would have been worth as much or more than the contract price, there is room for doubt as to whether it is a proper one where such work would have been worth less than the contract price. An application of the above rule to such a situation might show no difference between the value of the work done and that contracted to be done, thereby compelling the owner to pay the full contract price for something other than what he contracted for. Inasmuch as the right of a contractor to recover where he has not fully performed is supposed to rest on equitable considerations, this ought not to be tolerated. The way out of the difficulty would be always to consider the value of the work contracted for as not less than the contract price.

In conclusion, it may be noted that where the contractor has intentionally failed to comply with the specifications, the owner is entitled to be allowed the cost of making the work conform to such specifications, and not merely the difference between the value of it as done, and the value of it if performance in accordance with the contract, although he does not undertake to remedy the defects complained of.⁴⁸

fective condition, and its value if perfectly constructed. This rule is applied whenever the structure or building is useful to the owner in its defective condition, and it is neither fair nor reasonably practicable to remedy the defects by the making of repairs. In other cases, where there is a failure to complete the work, and such failure may reasonably be remedied by the expenditure of additional labor and materials, or where the defects are of such a character that they may be fairly and reasonably remedied by the expenditure of labor and materials, the proper rule seems to be to deduct from the contract price such sums as would be reasonably necessary to complete the work according to the contract, or to make such repairs."

⁴⁶ *Jacob & Youngs v. Kent* (1921) 230 N. Y. 239, — A.L.R. —, 129 N. E. 889.

⁴⁷ *Sherry v. Madler* (1905) 123 Wis. 621, 101 N. W. 1095.

⁴⁸ *Turner v. Henning* (1920) 49 App. D. C. 183, 262 Fed. 637.

Where the contractor without the consent of the owner has sub-
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stituted brick construction where the contract called for artificial stone, the measure of damages is the cost of replacing the work with the material called for by the contract, although the value of the completed building is not greatly reduced by the substitution of brick for the artificial stone. *Pence v. Dennie* (1919) 41 Cal. App. 428, 182 Pac. 980.

Where a contractor has substituted other materials or altered the plan of construction, in arriving at the difference in value of the house as built and as it should have been built under the contract, the cost of taking out all the work and material not according to the contract, and having such work done over, should be ascertained. *Kiel v. Kline* (1893) 15 Ky. L. Rep. 158.

In *Spink v. Mueller* (1898) 77 Mo. App. 85, a majority of the court held that the measure of damages recoverable for the substitution of inferior varnish in finishing a house was the sum necessarily expended by the owner in removing the varnish and revarnishing; the dissenting member of the court taking the position that, the house having been used by the owner, the true measure of his damages was the difference between the work as done and as it ought to have been done.

Where the contractor substituted an iron pipe for a strong lead water pipe required by the contract, he must pay the owner, not the difference between the iron and lead pipes, but the cost of laying a lead pipe as provided for in the agreement. *Morgan v. Gamble* (1911) 230 Pa. 165, 79 Atl. 410.

In *Walter v. Huggins* (1912) 16 Mo. App. 69, 148 S. W. 148, it is held that the measure of damages for defective workmanship in the performance of a contract to plaster a building (the surface having been left uneven and wavy) was not the difference in the value of the plastering as done and the value of the work had it been done in accordance with the contract, but the cost of making the work conform to the contract by removing the finishing coat and replacing it, even though the owner, without waiving the contract or acquiescing in its defective performance, had taken possession of the building and by continued use evinced an intention to use the plastering so long as it might be used. The court said: "The defendant owner has suffered no diminution of rental value of the building, and for aught disclosed the plastering will last as long as plastering put on with an even surface would last. If the owner chooses to use the work as long as it will last, it will not suffer any pecuniary loss, and, as it does not intend to occupy the building except by tenants, the work will be just as valuable to it as work properly done. Must we say then that, having a work just as valuable as that specified in the contract would have been, the owner has no remedy, no right to a performance of the contract, or the just equivalent of such performance? We think we are not constrained to pronounce a rule so emasculatory of one of the most fundamental principles of contract
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law. The substitution by the contractor of poor workmanship for good was a breach of his contract, and as the poor workmanship was of a character to affect the whole job—to leave its entire surface uneven, wavy, and lumpy, a standing offense to the eye and taste—the defect was as much a variance from the general plan and specifications as was the substitution of stock brick for pressed brick in the case of *Marsh v. Richards* (1859) 29 Mo. 99, where Judge Scott said that, if one pays for the gratification of his taste, he has a right to have it gratified, and the delinquent contractor will not be heard to say that the house built of cheap material is as valuable as one built of more costly material. So an owner is entitled to good workmanship when he pays for it and stipulates for it.” E. S. O.

[SUPREME COURT OF NOVA SCOTIA.]

DOMINION SUPPLY & CONSTRUCTION COMPANY v.
FOLEY BROS.

53 Nova Scotia, 333.

Contracts — Statute of Frauds — Oral sale of sand and gravel.

Sand and gravel are a part of the soil and are “land” within the meaning of the 4th section of the Statute of Frauds, and an oral contract for the sale of such material cannot be enforced.

— Provision for passing inspection — Liability for part rejected.

Where sand and gravel contracted for is required to pass inspection and payment is to be made for that which passes such inspection, there is no liability to pay for that rejected. Per Drysdale, J.

— Part performance — Doctrine inapplicable where right to specific performance gone.

Part performance is an equitable doctrine and cannot be relied upon to take a case out of the Statute of Frauds where specific performance has become impossible. Per Ritchie, E.J.

(December 19, 1919.)

APPEAL from judgment of Harris, C.J., dismissing, with costs, plaintiffs’ action on a verbal contract for the purchase of sand and gravel.

The judgment appealed from was as follows:—

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The plaintiffs sue for damages for breach of contract with defendants.

The defendants had a contract with his Majesty, the King, represented by the Honorable the Minister of Railways and Canals of Canada, for the construction of the first unit of the docks at the Halifax Ocean Terminals, and for the concrete work they required a large quantity of sand and gravel. For convenience, I will refer to the contract as being with the government.

The plaintiff company had been organized, and had acquired several islands near Chester, in Mahone bay, which were composed of sand and gravel, and they [334] approached the defendants for the purpose of selling the sand and gravel required for their contract with the government. A bargain was made, which, however, was not reduced to writing or signed at the time. The defendants took a small quantity of sand and gravel from plaintiffs' islands—less than their total requirements for the contract with the government—and they refused to take more.

The points involved are: (1) What was the contract between the parties? (2) Has there been a breach of that contract?

It was estimated at the beginning of the negotiations that 400,000 to 500,000 cubic yards of sand and gravel would be required for the government contract, but the quantity actually used is now said to have been 300,000 cubic yards.

The plaintiffs' claim is that their contract with defendants required defendants to take all the sand and gravel in their contract with the government, or the equivalent thereof in quantity, from plaintiffs' islands, regardless of its suitability for the purposes of their contract with the government, and whether they were able to use it or not. They do not put their contention in these words, but that is what it means if followed to its logical conclusion.

On the other hand, the defendants' contention is that, under the contract, they were to pay 8 cents per cubic yard for all the sand they might take from plaintiffs' holdings, but they claim that they were not bound to take all the sand required for the government contract,—and this involves the contention that they

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were not obliged to take any sand or gravel whatever from defendants.

But defendants also claim that the sand and gravel of the plaintiffs proved unsuitable and was rejected by the government engineers, and defendants were obliged to get other sand and gravel for the work.

Of the total quantity of sand and gravel required for the contract, *viz.*, 300,000 cubic yards, 7,350 cubic yards only came from plaintiffs' property (and was paid for), leaving 292,650 cubic yards which plaintiffs claim they are entitled to be paid for at 8 cents per cubic yard, equal to \$23,412, less \$500 received from sale of sand to other parties after the alleged breach of the contract.

[335] There is much obscurity about the actual contract, and I have to find if I can what the parties really agreed to.

There is a letter written by defendants during the negotiations, but before the verbal contract was entered into. It is dated February 10, 1914, and reads as follows:

Halifax, N. S., February 10th, 1914.

Joseph M. Tobin, Esq.,
Sect. Dominion Supply & Construction Co.,
Dennis Building,
City.

Dear Sir:—

Replying to yours of this date with reference to our sand and gravel specifications and requirements, for use on the Halifax ocean terminals, we beg to state that we will require for this work approximately 150,000 cubic yards of sand, 150,000 cubic yards of gravel to pass a 2-inch ring, 100,000 yards of gravel to pass a $\frac{3}{4}$ -inch ring. This material will have to be delivered to us at the rate of about 250 cubic yards of sand and 500 cubic yards of gravel per day, starting about June 1st. These figures are of course approximate, and the actual requirements of the work will have to be varied more or less, as the requirements of the work necessitate. The above figures we believe at the present time to be maximum.

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Will you please give us a figure based on the price per cubic yard for each different class of material as above stated, f. o. b. scows at the work, or at such other point in the Halifax harbor as may be hereafter designated. You will of course deliver this material to us on board scows, and we will arrange to unload same. We will require the free use of the scow after delivery is made for not less than forty-eight hours.

In the event of a contract being entered with you for the purchase of this material by us, you of course understand that it will be bought under the specifications as issued by the government engineers, and will be also subject to their acceptance or refusal upon delivery at the work.

Awaiting your reply, we remain,

Yours truly,

Foley Bros., Welch, Stewart, & Fauquier,

per DeWitt.

[336] At that time it was contemplated that plaintiffs would bring the sand and gravel to and deliver it at Halifax, but later this idea was abandoned, and both parties agree that the bargain eventually made was for sand and gravel at Chester to be transported by defendants, and not by plaintiffs.

Although apparently nothing was said about the letter when the parties eventually met to discuss the contract, it is, I think, clear that what both parties had in mind was sand and gravel that was within the specifications forming part of the defendants' contract with the government, and it was to be subject to the acceptance or refusal of the government engineer as required by that contract. That is what defendants specifically stated in the letter of February 10, 1914, to be a condition of any contract they might enter into, and it is what both parties must have had in mind. I would have had great difficulty in finding that defendants ever made a contract to take a quantity of sand and gravel from plaintiffs equal to their total requirements for the works in question, regardless of whether it was or was not suitable for their purposes, and regardless of whether or not they

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would be allowed by the government engineers to use it for the contract.

In my opinion the letter of the 10th February, 1914, was the basis of the subsequent negotiations, and what the parties met to discuss and did discuss was a sale and purchase of sand and gravel which had to be equal to that mentioned and described in the specifications attached to their contract with the government, and it had to be accepted by the government engineers. I am, however, of the opinion that plaintiffs were led to believe, by what Mr. Porter said, that all the sand and gravel required for the work would be taken from their holdings, provided it proved (as they both expected) suitable for the purpose and was accepted by the engineers of the government. They discussed the quantity required, and that would have been useless or of little importance if defendants were not to be obliged to take any, and then the price fixed would naturally be less if they were dealing with the whole quantity.

From the letter and the evidence of the witnesses, I find that the contract really entered into was that defendants were to take their total requirements of [337] sand and gravel for their contract with the government from the plaintiffs' property, provided the sand and gravel was such as defendants were required to use under their contract with the government, and provided it was accepted by the government engineers upon delivery at the works in Halifax.

The question is whether the sand and gravel was of the quality required, or whether it was rejected by the government engineers.

The contract of the defendant with the government contained the following clause:—

"119. The sand must be gritty and hard grained, sharp and coarse, with grains of angular form and with graded or various sizes containing the smallest percentage of voids. It must be clean and free from sticks, clay, loam, mica, lime, ligneous, earthy, vegetable, and organic matter or other deleterious substances, and shall be thoroughly washed if so required by the
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engineer. It must be of such quality that, when mixed with cement and made into test briquettes, it shall show tensile strengths of at least 80 per cent of the strength specified to be obtained from similar briquettes made from the same sample of cement and standard sand from Ottawa, Illinois."

There is no doubt, I think, that the sand which was brought by defendants from the plaintiffs' property at Chester proved unsatisfactory to, and a large quantity of it was rejected by, the government engineers.

On September 12, 1914, Mr. A. C. Brown, the government engineer, wrote defendants as follows:—

"The fine sand which you landed at the Blockyard for use in the reinforced concrete shells is of very inferior quality, and I must request that no more of it be landed. If you will notify me as each load of sand or gravel arrives, I shall try and arrange to inspect it before it is landed; this, in the event of a poor load, may save you considerable trouble. In storing your sand, gravel, and broken stone it will be necessary for you to keep the different grades separate; otherwise it will be quite impossible to accurately proportion the mixture. You will realize that this grading of the aggregate is of the utmost importance, and especially where the concrete is to be used in the seawater."

[338] Again, in a letter dated February 19, 1915, Mr. McGregor, superintending engineer, in a letter to defendants complaining of delay and other things, says:—

"Your gravel and sand supply last fall was, as you know, somewhat unsatisfactory, and better arrangements will require to be made this summer. This matter should receive immediate attention so that an adequate supply of first-class material will be coming forward when required at the opening of the season. Sand such as delivered from Chester last year required an admixture of some finer sand to obtain a satisfactory grading."

And again, in a letter dated May 19, 1915, Mr. McGregor wrote:—

"I regret to have to inform you that the quality of sand provided for use in the reinforced concrete shells is now such that it

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is unfit for further use. I am therefore compelled with great reluctance to reject it for use in the concrete. The question of a satisfactory supply of sand is one we have had constantly before us for the past year or more, and it is imperative that an adequate supply of suitable material be provided immediately; otherwise it will be necessary to stop work and much valuable time will be lost on its account."

A. C. Brown, the government engineer, was called and said:—

Q. Did you test this Chester sand, so called?

A. Yes.

Q. What did you find?

A. I found it was lacking in moderately fine sand.

Q. In other words, did you find it well graded?

A. Poorly graded; not up to specification; not well graded.

Q. How many tests did you make of this sand?

A. I suppose quite a dozen tests, but it was obvious it was not suitable. The contractors' engineer agreed in looking it over it was not suitable. It could be easily seen.

Q. Did they use it?

A. We used part of it, and we tried to make a good mixture of concrete by putting crushed rock with it and dust from crushings, and I think they got some sand from the eastern passage, and finally we told them they must get better material or stop the work until they could.

Q. Did you reject the sand?

A. We rejected that gravel as it stood.

Q. Could it be used without using other sand?

A. No; and without using other stone.

[339] Richard B. Porter, one of the defendants, says:—

Q. You spoke about the engineer finding fault with the sand; what engineer?

A. Mr. Brown was on the work; he inspected this sand.

Q. Was any complaint or report made by him in regard to sand delivered in 1915?

A. Yes.

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Q. I asked you about the engineer; was not Mr. McGregor the engineer in charge in 1914-1915?

A. He was.

Q. And you hadn't got any complaint from him?

A. I presume it was through Mr. Brown; he was on the work; the sand was not satisfactory; I got orders they could not use this material as far as classified material, and I had to go over to the North Shore and load a scow with rock to mix it with this material, and the report from Mr. Brown was the sand was too coarse, not enough fine in it; and not enough rock to fulfil the specifications required on the job, and they ordered me to go and get other material.

Q. Was not Mr. McGregor under your contract?

A. He was chief engineer.

Q. In 1914-1915?

A. Yes.

By the court: Q. Mr. Brown was assistant?

A. Yes.

By Mr. Jenks: Q. And Mr. McGregor was the man whose business it was to decide these things?

A. I can't say; when Mr. Brown would instruct us what to do we felt it our duty to do it same as Mr. McGregor.

Q. Mr. Brown was Mr. McGregor's assistant?

A. Yes.

James McGregor, who was superintending engineer, was overseas at the time of the trial, and it was adjourned in order that he might be examined and his evidence taken after his return. His evidence shows that of 7,350 cubic yards brought from plaintiffs' property in 1914, only 3,000 were accepted as suitable for the concrete shells. The balance of 4,000 was rejected, and it was used by defendants for temporary work, *i. e.*, buildings which defendants required for the purpose of performing the government contract, but not part of the contract. There was only a comparatively small quantity of material needed for this temporary work, and if less than half of the sand brought up could be used for the work under the government contract, it was, I

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think, obviously, not commercially possible to keep on bringing sand from that locality. The specifications referred to only one quality of material, and the engineers had the right to accept or reject, and they did [340] reject, a large quantity of the Chester sand for the concrete work.

Johnston Porter, one of the defendants, says, in speaking of the spring of 1915:—

“Mr. McGregor came down and condemned the material for the blocks, and said we would have to get other materials that suited the specifications, and of course I had to go out and get other materials. I prospected down the shore.”

Colonel Ralston, who appeared for plaintiffs on the final hearing, pressed very strongly a contention that the real reason why defendants gave up taking plaintiffs' material was not because suitable sand and gravel could not be obtained at Chester, but because defendants found they were able to get other material more conveniently. He based this contention on the following evidence of Senator Crosby. He says (page 9):—

I said to Mr. Porter how surprised we were to find he was breaking away from the contract which he had solemnized with me in such a friendly way, and he said something about the fact that they had got some sand which was more convenient for them; that the engineer had accepted, although intimating to me that this sand had been put before the engineer previously and they had not accepted it; that it was more convenient and easier for them to get—although perhaps it might cost them more or something of that kind; therefore he was going to give up taking our sand on that account; we had some—

Q. He stated that in the presence of these gentlemen?

A. Yes.

Q. You say he said he was giving up taking sand from you altogether?

A. Yes.

Joseph M. Tobin's version of the same interview is found on page 23 and is as follows:—

One of them wanted to know the reasons for leaving the
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islands, and Mr. Porter gave the reasons as he was able to acquire cheaper and better from East, and the stuff from Chester—conditions were not right; and Mr. Crosby, I think—

Q. Was anything said about they were through at Chester?

A. I believe he said this for the first time to my knowledge.

Q. They were through getting sand at Chester?

A. I believe so; he gave weather conditions on the coast as a reason [341] and he was getting it cheaper, but not better—quick er, I think he said. I don't think he said better.

This was his direct examination.

Richard B. Porter, with whom this conversation took place, was asked about it by plaintiffs' counsel on cross-examination, and his version is as follows:—

And you said you were getting the sand more conveniently elsewhere?

A. I did say that; we were going to get sand at other places more convenient and more fitted for doing our work; we were not getting it then, but were arranging; we hadn't got any sand elsewhere up to that time; we had tried quite a number of different places to get it.

Q. You spoke about the engineer finding fault with the sand; what engineer?

A. Mr. Brown was on the work; he inspected this sand.

Q. Was any complaint or report made by him in regard to sand delivered in 1915?

A. Yes.

Q. As well as 1914?

A. Yes.

And then follows E. B. Porter's statement already quoted as to the previous complaints of the engineer as to the quality of the sand.

I cannot find in the evidence of Senator Crosby the date of this conversation, but from the last remark quoted from his evidence it must have taken place in May or June, 1915. Mr. Porter tells us that he returned to Halifax in May, 1915, after an absence of some months.

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It does seem strange that Mr. Porter should have given convenience as the sole reason for changing from Chester to some other place, because the two letters from the engineers of September 12, 1914, and 19th February, 1915, had previously been written and probably also the letter of May 19, 1915; and from the other evidence quoted it is clear that the engineers had previously rejected the material from Chester, and Brown had told defendants "they must get better material or stop the work." I think in view of these facts and Mr. Tobin's doubt as to whether something was not also said by Mr. Porter as to the quality of the material, that I ought to accept Mr. Porter's version of what he said. It is impossible to think he would give a false excuse or omit all reference to the question of quality, which I am convinced was the real reason for the change.

From the evidence of Johnston Porter, and other [342] members of the defendants' firm, it seems that when the government engineers rejected the Chester sand they had to go looking for other sand, and eventually found it at Lawrencetown. There they had to buy a beach and build a railway, involving considerable outlay, and erect other plant to get suitable material, which seems to have cost more than the Chester material.

I find it impossible to believe that defendants were not getting the best material they could find at Chester in 1914. They had in view at that time no other place from which they could get the necessary material, and it was all important that they should get suitable material which the engineers would accept so that their work would not be delayed. Porter's beach was not discovered until after the letter of May 19, 1915, and, as I have said, that meant considerable outlay which might all be lost if the material did not continue satisfactory to the engineers.

It was suggested that there were different qualities or grades of material on plaintiffs' property at Chester, and defendants could have got the fine sand and stones required to mix with the material they brought up so as to make it satisfactory to the government engineers, but there is no evidence that such a course was commercially possible. Mr. McGregor did not know that it was possible, and refused, although frequently pressed, to say that it could be done. Mr. Arthur F. Dyer, an engineer called by

plaintiffs, when asked whether he would consider the plaintiffs' material satisfactory for the fine work on the terminals, said: "I think it would give very satisfactory results," and he said he would have no hesitation in using it; but Mr. Dyer was not the engineer who had to be satisfied. If he had been the government engineer, he perhaps would have accepted the material as good enough, but Mr. McGregor and Mr. Brown apparently were of a different opinion and rejected it.

I can find no evidence of bad faith on the part of the defendants in refusing to take further material from plaintiffs' property, and I find they ceased to take the material because it was impossible to find suitable material to meet the specifications or to pass the inspection of the engineers.

[343] I think this disposes of the action and that it must fail.

I should perhaps deal with a further contention which was made on behalf of the defendants. It appears that when the verbal contract was made, the parties spoke of having a written contract drawn up,—one was subsequently drawn by Mr. Jones, but it is not very clear who employed him to do it. The contract as drawn adopted the defendants' contention that they were only to pay for sand removed, and did not impose any liability on defendants to take all the material from plaintiffs' property. This contract, however, was drawn after trouble had been experienced by defendants in getting suitable material at Chester, and it is of no evidentiary value in the case on the question as to what was the real contract. I refer to it only because it led to a discussion between Mr. McLeod, the defendants' representative, and Senator Crosby, in which the Senator was urging that the contract should be rewritten, adopting his version that they were to obligate themselves to take all the sand required for the terminal work, and Mr. McLeod says: "And Mr. Crosby said, 'This thing will have to be signed in accordance with your arrangements within the next day or two, or we must call the whole thing off.'"

This conversation was on April 24, 1915, and is not denied, and the defendants contend that it amounted to a cancellation of the verbal contract, because no writing was ever signed. It appears, however, that, after this conversation, defendants took a quantity of sand in May and early June, from Chester; and it is
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evident that they did not regard what Senator Crosby had said as amounting to a cancelation. It was said, I have no doubt, as a threat or inducement to defendant to adopt his contention and sign the contract, and it was not intended by Senator Crosby as a cancelation, nor was it so regarded by the defendants, and I find that it did not have the effect of canceling the verbal contract.

A question was also argued at some length that the contract was within the Statute of Frauds, but, in the view I take of the facts, it is unnecessary for me to consider this.

The action will be dismissed, with costs.

[344] J. L. Ralston, K.C., in support of appeal. The judgment is based on the general statement that if less than half the sand brought up could be used for work under the government contract it was not commercially possible to keep on bringing sand from that locality.

The first work to be done was the making of concrete shells, which required the finest grade of sand. The best material was taken for that purpose and the balance was used in temporary concrete work.

Up to May 19th there was no rejection of sand that justified rescission of the contract. At the time the letter of May 19th was written, there could have been very little of our sand remaining in the pile. The bulk of the sand there came from other places.

To make a proper grading, sand is taken from different places. All the sand in one beach is not of the same quality.

The contract was for sand at Chester, and the burden is on defendants to show that the material provided was not suitable for work under the specification. If the sand was there, defendants were to take what was sufficient for their requirements under the contract. The evidence is that the sand at Chester was of good quality, and there is no evidence the other way. Samples had been submitted and approved by the superintending engineer, McGregor. The sand had been used by the military for seventy years. The only suggestion is that it did not contain certain percentages.

The real reason why defendants broke the contract was not the

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quality of the sand, but because they were getting sand from a more convenient place.

W. C. McDonald, contra. The sand was to be approved by the government engineers at Halifax. It was rejected for that reason. We brought up 7,200 yards, of which the government engineers rejected half. [345] It was not commercially possible to continue. We were to take what sand we required that was suitable for the work, provided it was approved by the government engineers. We could stop when we liked. It was subject to acceptance upon delivery at the works at Halifax, and we were to pay an agreed price for the quantity approved and accepted. The sand which did not pass inspection was used for other purposes and paid for.

The contract for sale of sand was a contract for the sale of an interest in land within the Statute of Frauds, R. S. 1900, chap. 141, 57. *Constable v. Nicholson* (1863) 14 C. B. N. S. 230, 143 Eng. Reprint, 434, 32 L. J. C. P. N. S. 240, 11 Week. Rep. 698, 8 Eng. Rul. Cas. 337; Halsbury's Laws, vol. 11, pp. 336, 340, ¶ 667; Gale on Easements, 1; Sale of Goods Act, Acts 1910, chap. 1, § 2, subs. h; *Morgan v. Russell* [1909] 1 K. B. 357, 78 L. J. K. B. N. S. 187, 100 L. T. N. S. 118, 25 Times L. R. 120, 53 Sol. Jo. 136; *Hingley v. Lynds* (1918) 44 D. L. R. 746; Halsbury, Laws, vol. 25, pp. 112, 142, note i; Leake, Contracts, 6th ed. p. 168.

Assuming that the contract was one for the sale of an interest in land, and that there has been part performance, the contract was one that could not be specifically performed. There was no action at law for breach of a purely equitable right. Part performance is an equitable doctrine, and is not sufficient.

In *Lavery v. Pursell* (1888) L. R. 39 Ch. Div. 508, 57 L. J. Ch. N. S. 570, 58 L. T. N. S. 846, 37 Week. Rep. 163, when the writ was issued it was impossible to give specific performance. *Re Northumberland Ave. Hotel Co.* (1886) L. R. 33 Ch. Div. pp. 16, 18, 54 L. T. N. S. 777; Leake, Contr. 6th ed. 820; Fry, Spec. Perf. 5th ed. 291, 298, 313, 637.

In the present case the writ has been completed. A profit à prendre cannot be enforced. The contract is one of which part performance could have been allowed. Acts must be referable to 10 B. R. C.

no other contract than that alleged. The acts must be such as to render it a fraud if not enforced. The parol evidence must be such as to show that the acts were done in performance of the contract alleged. Plaintiff lost whatever right he had by delay. The contract was not to be performed within [346] a year. *Prested Miners Gas Indicating Electric Lamp Co. v. Henry Garner* [1911] 1 K. B. 435, 80 L. J. K. B. N. S. 819, 103 L. T. N. S. 750, 27 Times L. R. 139.

Ralston, K.C., in reply. The burden is on defendant to show that the sand at Chester will not pass the inspector. The evidence that some sand which was brought up did not pass is not sufficient. The performance of the condition cannot be prevented by sending up bad sand when there is good sand there. The contract was changed when it was agreed that the defendants, and not the plaintiffs, should dig up and transport the sand to Halifax. The interpretation now must be that plaintiffs would produce sand at Chester which when brought to Halifax would pass inspection. *Mackay v. Dick* (1881) L. R. 6 App. Cas. 251, 29 Week. Rep. 541; *Smith v. Gordon* (1880) 30 U. C. C. P. 553.

In *Morgan v. Russell*, the judgment is based on the fact that it is a license to go on the land plus a sale of the slag.

In *Webber v. Lee* (1882) L. R. 9 Q. B. Div. 315, 51 L. J. Q. B. N. S. 485, 47 L. T. N. S. 215, 30 Week. Rep. 866, 47 J. P. 4, there was a right over the land, coupled with an interest. Effect of Sale of Goods Act. This was a sale of goods, and not a giving of an interest in land. Benjamin, Sales, 5th ed. 190; 25 Halsbury, 113; Blackburn, Sales, 16. According to Halsbury the test is what did the parties intend. In *James Jones & Sons v. Tankerville* [1909] 2 Ch. 440, 5 B. R. C. 202, 78 L. J. Ch. N. S. 674, 101 L. T. N. S. 202, 25 Times L. R. 714, it was held that mutuality is not necessary. In *Lavery v. Pursell* specific performance could not have been had.

Sand that washes up and back is no more attached to the land than trees are.

As to time of performance of contract. *Fenton v. Emblers* (1762) 3 Burr. 1278, 97 Eng. Reprint, 831, 1 W. Bl. 353, 96 Eng. Reprint, 196; 7 Halsbury, 365; *Anon.* (1693) 1 Salk. 280, 10 B. R. C.

91 Eng. Reprint, 244; *Walker v. Johnson* (1878) 96 U. S. 424, 24 L. ed. 834; *Miles v. New Zealand* (1885) 32 Ch. Div. 266, 55 L. J. Ch. N. S. 801, 54 L. T. N. S. 582, 34 Week. Rep. 669; *Donellan v. Read* (1832) 3 Barn. & Ad. 899, 110 Eng. Reprint, 330, 1 L. J. K. B. N. S. 269, 6 Eng. Rul. Cas. 298; *Silkstone v. Joint Stock Coal Co.* (1876) 35 L. T. N. S. 668; *Dunkirk Colliery v. Lever* (1879) 41 L. T. N. S. 633, 43 L. T. N. S. 706; *Whitaker v. Bowater* (1918) 35 Times L. R. 114.

Drysdale, J.: I agree with my brother Ritchie that the Statute of Frauds is an [347] answer to this action. Whatever may be said for the Sale of Goods Act, I do not think that act was ever intended to turn land into goods.

I also agree with the finding of the learned trial judge that the sand and gravel to be furnished under the contract was to pass the inspection of the government engineers at the works in Halifax. The defendants took and paid for all that passed inspection.

I think the appeal must be dismissed, with costs.

Longley, J., concurred.

Ritchie, E.J.: The introductory facts are stated as follows in the judgment appealed from.

(The judgment appealed from is printed in full, ante, p. 776.)

The learned Chief Justice dismissed the action. In this conclusion I agree, but I am not without grave doubt as to the branch of the case dealt with in the judgment. I therefore put my judgment on the Statute of Frauds.

The first point is, Was the sand and gravel an interest in land within the meaning of the 4th section of the Statute of Frauds? I am of opinion that it was. There is, I think, a distinction between trees attached to and forming part of the land and the land itself. I rely upon the case of *Morgan v. Russell* [1909] 1 K. B. 365. In that case the contract was for the removal of cinders and slag. It was held that the cinders and slag were part of the soil, and that therefore the 4th section applied. Lord Alverstone said:—

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"The contract appears to me to be exactly analogous to a contract which gives a man a right to enter upon land with liberty to dig from the earth *in situ* so much gravel or brick, earth or coal, on payment of a price per ton."

I think this quotation is applicable to this case.

In *Hingley v. Lynds* (1918) 44 D. L. R. 746, I distinguished *Marshall v. Green* (1875) L. R. 1 C. P. Div. 35, 45 L. J. C. P. N. S. 153, 33 L. T. N. S. 404, 24 Week. Rep. 175, but did not express any dissent from it. The English Sale of Goods Act, which Lord Alverstone had [348] under consideration, is in terms the same as our Sale of Goods Act.

I might refer to other authorities, but, apart from authority, it is to my mind not possible to properly hold that the soil constituting the land is not essentially part of the land. Part performance is relied on to take the case out of the statute. The answer to this point is that part performance is an equitable doctrine, and only to be applied where specific performance could on that ground be decreed. In this case it was admitted that specific performance had become impossible. In *Lavery v. Pursell* (1888) L. R. 39 Ch. Div. page 518, Mr. Justice Chitty said:—

"Now this question of part performance resolves itself into this. Part performance was an equitable doctrine, and, putting it shortly, where there was performance under the contract it took the case out of the statute, but it was an equitable doctrine applied by the courts of equity, and it was applied in those cases where the court would grant specific performance, for instance the case of a sale of land; but if before the Judicature Act the court dismissed the bill because it was not a case for specific performance, a court of law, when asked to give damages, the contract not being within the 4th section, had no alternative but to refuse and to give judgment for the defendant in the action. But since the various amendments which have taken place in the law with regard to equitable doctrines, it has never been decided, so far as I am aware, that the equitable doctrine of part performance can be made use of for the purpose of obtaining damages on a contract at law."

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The result is that I feel myself driven to give effect to the Statute of Frauds.

On the ground that the 4th section of the Statute of Frauds is applicable, I would dismiss the action.

Appeal and action dismissed, with costs.

Note.—Contract for supply of sand, gravel, slag, etc., as within the Statute of Frauds.

It will be observed that the court in the reported case (*DOMINION SUPPLY & CONSTR. CO. v. FOLEY BROS. ante*, 775) reached the conclusion that sand and gravel constituted an interest in land within the 4th section of the Statute of Frauds, and that consequently a verbal contract for a supply thereof was unenforceable.

This decision finds support in *Weler v. I. H. Detwiler Co.* (1898) 15 Ohio C. C. 680, 8 Ohio C. D. 668, where the court distinguished between a contract merely to remove earth, and one to remove earth made primarily in order to obtain the earth, and held that a contract of the latter kind was unenforceable. With respect to the question the court said: "Now, if this was a mere contract to remove the earth, perhaps no question would be raised as to whether it was within the Statute of Frauds. But we are clearly of the opinion, from the statement made by plaintiff as a part of his testimony, that the consideration of \$50 for removing the earth was a small part of his contract, and the real thing that he expected to obtain was earth, as a part of this lot. It was out of the earth itself, which was to be his, that he expected to make his profit by reselling it or using it in refilling other lots, for which he was to get a compensation. So that we are constrained to hold that the substance of the contract was the sale of the earth itself—the \$50 to be paid him for removing it was simply incidental, and not the main consideration of the contract. Now, whether this is within the Statute of Frauds, we think is a question that is very largely decided for us in the case of *Hirsh v. Graham* (1893) 50 Ohio St. 57, 19 L.R.A. 721, 40 Am. St. Rep. 641, 33 N. E. 90, recently decided by the supreme court of this state. In that case the question arose in regard to the sale of some standing timber—whether or not the sale was within the Statute of Frauds. . . . There is quite an extensive opinion by Bradbury, J., the announcement of the opinion of the court occupying several pages, and the question is very fully discussed as to whether the Statute of Frauds is applicable to a case of that kind,—that class of cases. It is shown that in some states of this Union the courts hold that the Statute of Frauds is not applicable; but in a large majority of states the statute is applicable, and the opinion proceeds to say: 'The ques-

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tion is now for the first time before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendor with the soil. Coal, petroleum, building stone, and many other substances constituting integral parts of the land, have become articles of commerce, and, easily detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances with a view to their immediate removal would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury, as are the other integral parts of the land; and the question whether such sale is a sale of an interest in or concerning lands should depend not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty.' . . . Now, holding this to be a sale of a portion of the real estate, a sale of a portion of the land itself, we are clearly of the opinion that it falls within the Statute of Frauds, and that, the contract being verbal, no recovery could be based upon it."

And in *Morgan v. Russell* [1909] 1 K. B. 357, an agreement to sell plaintiff so much of the slag on demised premises as the defendant should desire, and giving access to the demised premises, and to cinder tips on adjoining land, was held not a contract for the sale of goods within § 62 of the Statute of Frauds, but a contract granting an interest in land within the meaning of such statute. The court said: "The learned judge has found, and we have no power to interfere with that finding, that the cinders and slag had become part of the ground or soil itself, and were not definite or detached heaps resting, so to speak, upon the ground. The learned judge considered that under these circumstances the default, if any, in the carrying out of the agreement, arose from a defect in the respondent's title, and that therefore, upon the principle of *Bain v. Fothergill* (1873) L. R. 7 H. L. 158, 43 L. J. Exch. N. S. 243, 31 L. T. N. S. 387, 23 Week. Rep. 261, the appellants were not entitled to recover damages for the loss of their bargain: The case for the appellants was rested upon two grounds: It was first said that this was a contract for the sale of goods within § 62 of the Sale of Goods Act 1893, and therefore the ordinary rule of damages applies; and, secondly, that, even assuming that the cinders and slag were not goods, the principle of *Bain v. Fothergill* would not apply, and the appellants were entitled to general damages. I am clearly of opinion that this was not a contract for the sale of goods. The respondent Morgan did not contract to sell any definite quantity of mineral, nor
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was it a contract for the sale of a heap of earth which could be said to be a separate thing. In my view the contract was a contract to give free access to certain tips for the purpose of removing cinders and slag which formed part of the soil, at the price of 2s. 3d. per ton, to include the value of the slag so taken, for so long as the appellants chose to exercise their option to take. The contract appears to me to be exactly analogous to a contract which gives a man a right to enter upon land with liberty to dig from the earth *in situ* so much gravel or brick earth or coal on payment of a price per ton. The first ground, therefore, in my opinion, is not one upon which the appeal can succeed."

And in *Davis v. Carnegie Steel Co.* (1917) 157 C. C. A. 281, 244 Fed. 931, an oral contract by which the defendant, in consideration of the plaintiff's agreement to remove two piles of slag from the defendant's premises, and keep certain furnace slag out of defendant's way, agreed to put up a slag-crushing plant and turn it over to the plaintiff, and also agreed that the plaintiff should have certain piles of slag, was held unenforceable, as it either related to an interest in land, or was a contract for the sale of goods in violation of the provisions of the Statute of Frauds. In disposing of the case the court said: "The slag dumps were either part of the real estate, or they were personalty. If part of the real estate, the agreement, not being in writing, was void under the Statute of Frauds (Ohio Gen. Code, §§ 8620 & 8621), as a grant of or a contract for an interest in lands, tenements, or hereditaments. If personalty, the contract was void under the Ohio Sales Act (Gen. Code, § 8384), for (as declared by § 8456) the term 'goods' embraces 'all chattels and personalty other than things in action or money.'"

In *Okin v. Selidor* (1909) 78 N. J. L. 54, 138 Am. St. Rep. 588, 78 Atl. 770, an agreement to lay a cement walk was held not to be brought within the section of the Statute of Frauds respecting interests in land because a contractor accepted a lower price for his work upon condition that he might have the sand which was excavated in the course of the work. The court stated that this was a mere mode of payment, and that the sand, when excavated and applied to such payment, was personal property, and not land or any interest therein.

J. T. W.

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[ENGLISH DIVISIONAL COURT.]

IN RE BATTIE-WRIGHTSON.

CECIL v. BATTIE-WRIGHTSON.

[1920] 2 Ch. 330.

Also Reported in [1920] W. N. 226, 36 Times L. R. 693, 64 Sol. Jo. 585.

Wills — Construction — Right to look at matter struck out in determining meaning of will.

The court may look at matter struck out from a will for the purpose of ascertaining the bank indicated in a bequest of testator's balance at "the said bank," no bank being named in the will.

(June 3, 1920.)

ORIGINATING SUMMONS.

By her last will dated October 3, 1917, the testatrix, after revoking all previous wills and appointing the plaintiffs and the defendant Battie-Wrightson her executors and trustees and giving certain annuities and legacies including a legacy of 6,000*l.* to Annie Maria Middleton, now the defendant A. M. Halliwell, and declaring them free of duty, proceeded:—

"I give the following legacies [to be paid out of the money [331] standing to my credit at the National Provincial Bank of England, Bishopsgate, E.C., and not out of any other moneys, namely] to Mrs. Annie Stevens"—and six other legatees sums amounting to 125*l.* "And I declare that all the said legacies shall be paid free from legacy duty. I give to the said Annie Maria Middleton in addition to the legacy which I have already given to her the undisposed balance which may be to my credit at the said bank after paying thereout the legacies lastly hereinbefore mentioned. And also my shares in"—certain named companies—"in the hope and expectation (but without imposing upon her or creating any trust whatever) that she will thereout or out of the income thereof at her sole discretion maintain the boy named Walter Frederick Perkins, who lives with us, until he attains the age of twenty-one years or until such earlier date as the said Annie Maria Middleton shall in her sole and absolute

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discretion consider him to be self-supporting. And I declare that the receipt in writing of the said Annie Maria Middleton for the said balance and shares shall be a sufficient discharge to my executors, and that they shall not be under any liability or responsibility whatever as to the application thereof by her."

After certain specific devises and bequests including a devise of the Wothorpe estate to Annie Maria Middleton, the testatrix devised and bequeathed her residuary real and personal estate to her trustees upon trust for sale and conversion and to hold the proceeds (after payment of her funeral and testamentary expenses, debts, and legacies) in trust for the defendant Battie-Wrightson absolutely.

On September 10, 1917, testatrix had instructed her solicitor to prepare a new will, and on October 3 he attended her with the above will in draft. By her direction he struck out the words in square brackets. Owing, however, to the state of her health, the testatrix decided to execute the altered draft as her will without waiting for a fair copy or engrossment, and this was accordingly done, the above alteration being duly attested by the testatrix and the witnesses to the will.

The testatrix died on October 29, 1917, and her will was proved on September 11, 1918, the canceled words being [332] omitted from the probate which was engrossed clean so as to read without any blank. "I give the following legacies to Mrs. Annie Stevens" and others, as above stated.

As no bank was mentioned in the probate, the question arose whether any and what balance passed to the specific legatee Annie Maria Halliwell under the above bequest. On March 31, 1920, the plaintiffs issued this summons to determine the point.

The evidence showed that the testatrix had accounts at seven banks. At the National Provincial Bank she had a balance of 1,977*l.* at the date of her will and 1,982*l.* at her death. At two other banks she had large balances, at three banks moderate balances, and at the remaining bank a 200*l.* overdraft.

The question was whether the "said bank" could be identified by reference to the original will which was produced from Somerset House.

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Philips Stokes, for the plaintiffs.

Hildyard, K.C., and **H. B. Vaisey**, for the residuary legatee. The original will can be looked at for purposes of punctuation, capital letters, etc., in the part admitted to probate, but the probate is conclusive as to the actual words of the will as a testamentary instrument. *Oppenheim v. Henry* (1853) 9 Hare, 802, note, 68 Eng. Reprint, 742. If an erasure does not appear on the probate it forms no part of the proved will and cannot therefore be used to construe it.

Even if the original will is looked at, it merely shows that the testatrix excluded the National Provincial Bank and then omitted to define what other bank she intended. That is void for uncertainty.

Luxmore, K.C., and **Roope Reeve**, for the specific legatee. The stricter course would have been for the executors to have applied for a facsimile probate, so that the erasures would have appeared thereon. This was done in *Shea v. Boschetti* (1854) 18 Beav. 321, 325, 52 Eng. Reprint, 127, 2 Eq. Rep. 608, 23 L. J. Ch. N. S. 652, 18 Jur. 614, 2 Week. Rep. 281, and *Gann v. Gregory* (1854) 3 De M. & G. 777, 780, 43 Eng. Reprint, 305, 2 Eq. Rep. 484, 18 Jur. 1063, 2 Week. Rep. 484. In that case the court could clearly look at the erasures as part of the proved will. But whether this is done or not the court can always look [333] at the original will including the erasures. *Shea v. Boschetti, supra*; *Manning v. Purcell* (1855) 7 De M. & G. 55, 61, 65, 44 Eng. Reprint, 21, 3 Eq. Rep. 387, 24 L. J. Ch. N. S. 522, 3 Week. Rep. 273; *Re Harrison* (1885) L. R. 30 Ch. Div. 390, 393, 394, 55 L. J. Ch. N. S. 799, 53 L. T. N. S. 799, 34 Week. Rep. 420; Hawkins, Wills, 2d ed. pp. 11-13; Williams, Exrs. 10th ed. pp. 445-447.

The doubt formerly expressed in *Gann v. Gregory, supra*, and by Sir E. V. Williams in the earlier editions of his books, is no longer law.

If the original will is looked at the case is clear. With the obvious intention of benefiting the specific legatee, the testatrix erased the words charging the 125*l.* legacies on the particular bank balance, but by inadvertence she omitted to strike out the words "after paying thereout the legacies hereinbefore men-
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tioned." The bank balance is still therefore subject to those legacies, but the identity of the said bank is manifest.

Suppose, however, that the court has no inherent right to look at the original will. On the face of the probate the word "said" is an obvious inaccuracy, and the balance at the testatrix's bank would pass. But on inquiry seven banks are found, to all of which the inaccurate description is equally applicable, though the testatrix obviously only meant a particular bank. That is a latent ambiguity, and as it raises a clear case of equivocation direct evidence of intention is admissible. *Hawkins, Wills*, 2d ed. p. 14; *Wigram, Extrinsic Evidence*, 5th ed. p. 110, prop. 7; *Miller v. Travers* (1832) 8 Bing. 244, 247, 131 Eng. Reprint, 395; *Doe ex dem. Hiscocks v. Hiscocks* (1839) 5 Mees. & W. 363, 368, 151 Eng. Reprint, 154; *Tudor, Real Prop.* 4th ed. pp. 489, 493; *Doe ex dem. Gord v. Needs* (1836) 2 Mees. & W. 129, 150 Eng. Reprint, 698. The original will can be put in evidence under this rule and the same result follows.

Hildyard, K.C., in reply. The ambiguity, if any, is patent on the face of the probate, and extrinsic evidence of intention is inadmissible. As to the right of the court to look at the original will, there are no doubt many authorities, but in none of them have the erasures actually been used to construe the un erased portion admitted to probate.

[334] **Astbury, J.** (after stating the facts): The question turns on two rules of construction: First, whether I can look at the original will and take into account the contents of the erased portion in order to ascertain the bank indicated as "the said bank," or, secondly, whether extrinsic evidence may be regarded for this purpose.

At the date of her will and death the testatrix had seven different banking accounts; at those dates respectively she had standing to her credit at the National Provincial Bank, 1,977*l.* and 1,982*l.* Her other banking accounts, except one, were in credit at both dates.

Whatever be the right construction to be placed upon this altered document, it is clear that an application can, if necessary, be made to the Probate Division to rectify the present probate by admitting to probate a facsimile copy of the original will show-

ing the erased matter; and anything that I determine in this case must be without prejudice to the right of any party to make this application.

On the first question, whether the court on a matter of construction can look at the original document and take into account the character of the erased portion, there are many authorities, with some of which I propose to deal. But I will first refer to the textbooks.

In Jarman on Wills, 6th ed. p. 44, the author says: "To determine the construction, the original will, both of real and personal property, may be looked at. It was said, indeed, by Sir W. Grant, in *Sanford v. Raikes* (1816) 1 Meriw. 646, 651, 35 Eng. Reprint, 808, that his decision on the construction of the will before him could not depend on the grammatical skill of the writer, in the position of the characters expressive of a parenthesis; that it was from the words and from the context, not from the punctuation, that the sense must be collected. And there are, probably, few imaginable cases in which punctuation could exercise a very important influence upon the construction. But in recent times the courts have without hesitation adopted the practice of examining original wills with a view to seeing whether anything there appearing—as, for instance, the mode in [335] which it was written, how 'dashed and stopped'—could guide them in the true construction to be put upon it."

In Hawkins on Wills, 2d ed., pp. 11-13, the following appears: "Mr. Hawkins observes: 'Notwithstanding a *dictum* of Sir W. Grant in *Sanford v. Raikes*, *supra*, it appears to be settled that in construing a will marks of punctuation, as parentheses, stops, capital letters, etc., may be taken into consideration. . . . In *Compton v. Bloxham* (1845) 2 Colly. Ch. Cas. 201, 63 Eng. Reprint, 699, Knight Bruce, V.C., sent for and examined the original will, and decided on the ground that the words "my moneys" began an entirely new sentence. It would seem that marks of punctuation, as stops, capital letters, etc., in the original will, may be adverted to, though not in the probate, and though the question relates to personal estate. *Oppenheim v. Henry* (1853) 9 Hare, 802, note, 68 Eng. Reprint, 742. But the probate is conclusive as to what the words of the will are. In *Man-*
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ning v. Purcell (1855) 7 De M. & G. 55, 44 Eng. Reprint, 21, 3 Eq. Rep. 387, 24 L. J. Ch. N. S. 522, 3 Week. Rep. 273, where the will, one of personalty, was a common printed form filled up by the testator, with parts of the form struck out, the original will was sent for, and Turner, L.J., in giving judgment, said: 'In coming to this conclusion, I have not overlooked the effect to be given to the erasures, as they appear on the original will. In *Child v. Elsworth* (1852) 2 De M. & G. 679, 683, 42 Eng. Reprint, 1038, . . . Cranworth, L.J., . . . said: 'It is only necessary to add that we have caused the original will to be examined, and it appears that the whole gift in question to the children and grandchildren of W. D., including the direction for the time of payment, is written continuously as one sentence, and is closed with a full stop.' " Lastly, *Re Harrison* (1883) L. R. 30 Ch. Div. 390, 393, 55 L. J. Ch. N. S. 799, 53 L. T. N. S. 799, 34 Week. Rep. 420, is referred to, where Lord Esher said: "I know of no rule that for the purpose of construing a will you may not look at the original will itself."

In Williams on Executors, 10th ed., pp. 445-448, the earlier authorities are examined, including *Shea v. Boschetti* (1854) 18 Beav. 321, 52 Eng. Reprint, 127, 2 Eq. Rep. 608, 23 L. J. Ch. N. S. 652, 18 Jur. 614, 2 Week. Rep. 281, which I will presently refer to, and it is mentioned that in former editions of the work Sir Edward Vaughan Williams doubted whether in strictness the Court of Chancery had not [336] gone beyond its legitimate means for construing wills of personalty where it had sought aid from appearances in the will itself not to be found in the probate. After referring to that passage the present authors say: "But the practice would seem to be to look at the original in such cases. The principle to be derived from the cases would appear to be that the original will may be looked at to assist the construction, but not to alter or vary or displace anything determined in the granting of the probate; and that if it is sought to do this, application must be made to the Probate Division to rectify the probate."

In *Manning v. Purcell*, *supra*, the will was written by the testator filling up the blanks in a printed form and making various erasures. In the document as executed the testator gave, devised, 10 B. R. C.

and bequeathed to his wife all his moneys, furniture, plate, books, linen, wearing apparel, etc. The next sentence in the printed form began: "And as to all the rest, residue, and remainder of my estate and effects." The testator struck out the words "as to" and the word "rest," leaving the sentence to read—"And all the residue and remainder of my estate and effects . . . I give, devise and bequeath the same unto my dear wife during the term of her natural life." The question was whether, having struck out the words "as to," so that the portion of the will following the gift of furniture and wearing apparel read all as one sentence, the wife's interest in the furniture and wearing apparel was cut down to a life estate, or whether she took the furniture absolutely and a life interest only in the residue. Knight Bruce, L.J., referring to the view of Turner, L.J., then absent from the court, to the effect that the wife took the furniture absolutely, said (7 De M. & G. 61): "He is of opinion that the Vice Chancellor's interpretation of the will is in this respect correct, thinking that a sufficiently strong inference to the contrary is not to be drawn from the erasure of the words 'as to,' especially when compared with other erasures." At a later stage of the case Turner, L.J., himself said (7 De M. & G. 65): [337] "I will only add to the observations which have been already made this remark with reference to the erasure of the words 'as to,' namely, that there are other words also struck out by the testator from the printed form in a way which shows that no reliance can be placed upon the erasures as having been deliberately and advisedly made with a view to alter the construction to be put upon the will. In coming to a conclusion upon this question, I have not overlooked the effect to be given to the erasures as they appear on the original will."

Now it is quite true that neither in that case nor apparently in any other reported authority were erased words used as an effective portion of the will in the sense of allowing them to give a different operation to other portions of the documents than would have otherwise been the case. But I think it is quite clear from Turner, L.J.'s expressions that he was of opinion that if the erasure in the case before him had been sufficiently explicit

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he would have given effect to it on the construction of the clause following it.

In *Shea v. Boschetti, supra*, the probate of a will originally granted without showing erasures was revoked and a new probate issued showing them. Romilly, M.R., said (18 Beav. 325): "In my opinion, the fact of the Court of Probate granting a facsimile probate does not, in the slightest degree, affect the rules of construction, or the manner in which this court must deal with the case presented to it. The probate of the will performs its function by telling the court what the will consists of; but whether the Court of Probate grants a facsimile probate or not, I apprehend this court is bound to look at anything in the original will itself, which may aid and assist it in coming to a correct conclusion, as to the construction to be put upon the contents of the will." That means, if it means anything, that the erasures may be considered for the purpose of putting the true construction upon what would otherwise be a doubtful passage in a portion of the will that was admitted to probate.

In *Gann v. Gregory* (1854) 3 De M. & G. 777, 780, 43 Eng. Reprint, 305, certain legacies originally written [338] in a draft will were crossed out by diagonal lines in ink. Lord Cranworth, during the argument, referring to the struck-out portions, said: "They may be left to show the meaning of the testator; suppose for example a case of this kind—a testator says: 'I give A B an annuity of 500*l.* and I give him also 1,000*l.*' and he then strikes out down to and including the words 500*l.*" The Lord Chancellor does not answer his own conundrum, but he obviously intended that in that case where the will would only contain the words "and I give him also 1,000*l.*," the erased portion could be looked at to ascertain that "him" meant A B. That view is directly in point in the present case. In the judgment Lord Cranworth throws some doubt upon the right or duty of the court on every occasion to look at the original will, but having regard to the subsequent authorities that doubt no longer exists.

In *In re Harrison* (1885) L. R. 30 Ch. Div. 390, a testatrix used a law stationer's form printed with blanks to be filled up. After directing her debts and funeral and testamentary expenses to be paid by "my executrix hereinafter named," she gave all her

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real and personal property "unto ——— to and for her own use and benefit absolutely, and I nominate, constitute, and appoint my niece Catherine Hellard to be executrix." The name of the residuary devisee and legatee was left in blank, but there were the words "to and for her own use and benefit." Now the only antecedent to "her" was "my executrix hereinafter named." That was Catherine Hellard.

The Court of Appeal held that for the purpose of construing the will the court was entitled to look at the original, and having done so they held that Catherine Hellard was entitled to the property. Lord Esher said (*ibid.* 393): "The main argument in this case is founded on their being a blank in the will, and how can you tell that there is a blank without looking at the will? I know of no rule that for the purpose of construing a will you may not look at the original will itself." Baggallay, L.J., said (*ibid.* 394): "I fully agree that for many purposes the first [339] thing to be looked at is the probate copy of a will. But when I look at the probate copy in this case I find that there is a blank space in it. This is consistent either with an accidental omission to fill up the blank, or with an intention not to fill it up. It then becomes very material to look at the original will. . . . The conclusion that the testatrix intended to fill up the blank at some future time would be inconsistent with her declared intention to revoke all former wills and make that her last will and testament." It is plain that the court looked at the original to find out whether the blank in the probate showed that the testatrix had not yet made up her mind who should be her devisee, or whether it was only due to an accidental omission.

Such being the general nature of the authorities, I have no doubt myself that it is not only the right, but the duty, of the court in this case to have regard to this erased portion of the will. That being so, it is clear that the expression "undisposed-of balance which may be to my credit at the said bank" means the balance at the only bank mentioned by name. The passage mentioning it was erased, not, as the residuary legatee contends, for the purpose of rendering it doubtful which bank the testatrix was referring to, but for some totally different purpose, because it is perfectly obvious that she intended to give a particular

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balance for a particular specified purpose. That being so, I am prepared on that ground alone to hold, on the true construction of this will and in the events which have happened, that the specific legatee is entitled to the undisposed-of balance at this particular bank after payment thereof of the 125*l.* legacies.

There is, however, another ground upon which this case can be decided, although I prefer the one that I have already dealt with. On the second point the question is whether "undisposed of balance at the said bank," no bank being mentioned by name, is in the circumstances a patent or a latent ambiguity. The testatrix gave, and unquestionably intended to give, a bank balance, and the only ambiguity arises as soon as evidence is admitted that she had more than one bank. The word "said" points to her having some particular [340] balance in her mind, especially when evidence has been admitted that she had more than one balance standing to her credit. The particular extrinsic evidence which is necessary and sufficient in this case is the original will. That is admissible under the extrinsic evidence rule as well as under the general rule I have already dealt with. Evidence to show the actual testamentary intentions of a testator is admissible only in exceptional cases, one of which is to determine which of several persons or things was intended under an equivocal description. Hawkins, Wills, 2d ed. p. 14; Wigram on Extrinsic Evidence, 5th ed. p. 110, prop. 7. In *Doe ex dem. Hiscocks v. Hiscocks* (1839) 5 Mees. & W. 363, 368, 151 Eng. Reprint, 154; Tudor, Real Prop. 4th ed. pp. 489, 493, Lord Abinger said: "Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express."

The residuary legatee contends that this is a patent and not a latent ambiguity, but I am unable to take that view. It is reasonably plain that the testatrix was pointedly referring to a particular fund, and the ambiguity is latent in that there is more

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than one bank to which she may have been intending to refer. This ambiguity may be cleared up by looking at the original to see what the antecedent was in the document which she in fact signed. For these reasons the question must be answered in the manner I have indicated.

Solicitors: *Foyer, White, Borrett, & Black; Routh, Stacey, & Castle, for Stapleton & Son, Stamford.*

Note.—Right to look at matter canceled or erased in interpreting remaining portion of will.

A search has failed to disclose any decisions, other than those referred to in the reported case, upon the question whether matter canceled or erased from a will may be looked at in interpreting the remaining portion. This question, it should be noted, is distinct from the question whether the intended obliterations are to be disregarded and the will to be given effect as it was originally written and executed. In such a situation the question of course is, whether there has been an effectual revocation of the portion stricken out. For annotation on this point, see note in 38 L.R.A.(N.S.) 797, on "Attempt to revoke portions of a will by burning, tearing, canceling, obliterating, or destroying."

In *Thomson v. Thomson* (1892) 115 Mo. 56, 21 S. W. 1085, 1128, it was held that a former unattested will, the genuineness of which was indisputable, was admissible in evidence for the purpose of removing a latent ambiguity as to property intended to be devised, occasioned by conflicting descriptions.

In *Re McAllister* (1921) 191 Iowa, 906, 183 N. W. 596, where a testator, who had given his residuary estate to his wife and son in equal portions, thereafter struck out with a pen the reference to his son, writing on the margin of the will: "Canceled June 27th, 1912, because Alexander McAllister my son died May 13th, 1912, and his only surviving son May 25th," it was held that, although the changes in the will by which the testator attempted to give all his residuary estate to his wife could not operate as a codicil, because not witnessed or executed with the formalities required by law, they might be taken into consideration as indicating his intention that his wife should have the proceeds of his life insurance, to which, under the provisions of a statute, she would be entitled in the absence of an agreement or assignment to the contrary.

E. S. O

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[HOUSE OF LORDS.]

SIR W. G. ARMSTRONG, WHITWORTH, & COMPANY,
 LIMITED, *Appellants*,
 and
 REDFORD, *Respondent*.

[1920] A. C. 757.

Also Reported in 13 B. W. C. C. 68, 123 L. T. N. S. 114, [1920] W. N. 145,
 36 Times L. R. 451, 64 Sol. Jo. 388.

Workmen's compensation — Accident arising out of and in the course of employment — Injury while returning from lunch at employer's canteen.

An injury to a girl machinist arose out of and in the course of her employment where, during her dinner hour while returning to work, she fell down a flight of stairs leading to the street from a canteen at which she had eaten, and which was maintained by the employer on its premises for such women workers as chose to use it, but which could be reached only by the street.

— Test to be applied.

The test of whether the injury arises in the course of the employment is not the situation or ownership of the premises, but whether resort to the premises is a part of the duty owed to the employer. Per Lord Dunedin.

(March 26, 1920.)

Present: Viscount Finlay, Lord Dunedin, Lord Sumner, Lord Parmoor, and Lord Wrenbury.

APPEAL from a decision of the Court of Appeal [1919] W. N. 153, 88 L. J. K. B. N. S. 850, 121 L. T. N. S. 293, 35 Times L. R. 508, 63 Sol. Jo. 534, 12 B. W. C. C. 198, affirming an award of the judge of the Manchester County Court under the Workmen's Compensation Act 1906.

The following statement of facts is taken from the judgment of Viscount Finlay:—

“The respondent is a machinist and was in the employ [758] of the appellants at their works in North street, Manchester. As stated by the arbitrator in the course of his judgment:—

“‘It is a rule at the works that all employees should leave the premises at 1 P. M. for an hour. They leave by the exit from the 10 B. R. C.

works in North street. The employees then are free to go where they like, either to obtain dinner or for any other purpose. They all have to return and "clock on" at 2 P. M., when the hooter sounds. It sounds for some few minutes, and anyone who is late loses half an hour's pay.'

"On October 2, 1918, the respondent was at the appellants' works in the course of her employment. At 1 P. M. she left the premises by the entrance to the works in North street. She then walked a few yards along the pavement till she came to the outer door leading upstairs to the canteen, into which she went.

"This canteen is situate over the office of the appellants, and is provided by them for their workpeople. The building in which are the office and canteen is situate some little distance from the works, but within the same outer wall as shown in the plan. There is a doorway giving access to the passage at the foot of the canteen stairs from the other passage by which the workpeople obtain access to the street from the works and *vice versa*, but this door is open only at night for the use of the employees on the night shifts. The building in which is the canteen belongs to the employers, and the canteen is kept up by them for the benefit of their workpeople and is under the control of the employers. The employees are entitled to use the canteen, and they may either bring their food and eat it there, or obtain food in the canteen. If there is any surplus from the takings at the canteen after paying expenses it is devoted to charitable purposes, and the employers derive no profit from it. No persons other than employees of the appellants are permitted to use the canteen.

"The respondent, on the day of the accident, took her midday meal at the canteen, and when the hooter sounded for return to work at 2 P. M., in going down the stairs leading [759] from the canteen itself to the exit into North street, she slipped and broke her ankle."

The county court judge found that the injury arose out of and in the course of the respondent's employment and made an award in her favor. The Court of Appeal (Swinfen Eady, M.R., Warrington and Duke, L.JJ.) held that there was ample evidence to support the finding of the arbitrator and affirmed his award.

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Rigby Swift, K.C., and Meynell, for the appellants. This accident did not arise out of or in the course of the respondent's employment, because she owed no duty to her employers to go into this canteen, and the canteen cannot be held to be part of the works. She might just as well have had her dinner at home and in that case clearly the employers would not have been liable. When a workman leaves the sphere of his work and the duties which he is employed to do cease, then the accident does not arise out of or in the course of the employment. There was here an interruption of the employment by the dinner hour, and during that hour the respondent was not in the place where she was engaged at her work, and, in fact, was not allowed to be there. It is immaterial whether the accident happens on the employer's premises or not; the test is whether it happens as the result of some duty owed to the employer. It would have made no difference to the appellants' argument if the door between the works and the canteen had been open, as it was at night. Some confusion arises from the use of the term "employer's premises." If the term is used to mean that part of the employer's holding where his workmen are employed, this canteen was not part of the employer's premises; and if the county court judge finds that this was part of the premises upon which this girl was working there is no evidence to support that conclusion. It is closed away from the works, it is approached by the street, and no work is carried on there. The fact that an employer provides accommodation for his employees to which a workman may go or not as he pleases does not make him responsible for any accident to the [760] workman while there. This case is governed by the principles laid down by this House in *Parker v. S.S. Black Rock* [1915] A. C. 725, 728, [1915] W. N. 204, 84 L. J. K. B. N. S. 1373, 113 L. T. N. S. 515, 31 Times L. R. 432, 59 Sol. Jo. 475, 8 B. W. C. C. 327, Ann. Cas. 1916B, 1290, and *Davidson v. M'Robb* [1918] A. C. 304, 321, 87 L. J. P. C. N. S. 58, 118 L. T. N. S. 451, 34 Times L. R. 213, 62 Sol. Jo. 347, 10 B. W. C. C. 673, 55 Scot. L. R. 185. Those cases establish the proposition that, in order that liability may accrue under the act, the accident must arise while the workman is doing something, or is in some place, in furtherance of the duty which he owes to his master. In 10 B. R. C.

Blovelt v. Sawyer [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105, the man was taking his meal at the works, but that case, unless distinguishable was strongly decided and is inconsistent with the law as stated in this House. Farwell, L.J., in explaining that case in *Gilbert v. S.S. Nizam* [1910] 2 K. B. 555, 79 L. J. K. B. N. S. 1172, 103 L. T. N. S. 163, 26 Times L. R. 604, 3 B. W. C. C. 455, says that a man who is crushed by a falling wall on his employer's premises while he is eating his dinner recovers compensation because he is entitled to be on the spot by virtue of his contract of employment, notwithstanding that, and not because, he was eating his dinner. "The necessity for food," he says, "no more arises out of his employment than the necessity for sleep." The decision of the Court of Appeal in the present case is indistinguishable in principle from *Bell v. Armstrong* (1919) 12 B. W. C. C. 138, [1919] W. N. 151, 88 L. J. K. B. N. S. 844, 121 L. T. N. S. 258, 35 Times L. R. 479, 63 Sol. Jo. 533, and *Philbin v. Hayes* (1918) 11 B. W. C. C. 85, [1918] W. N. 166, 87 L. J. K. B. N. S. 779, 119 L. T. N. S. 133, 34 Times L. R. 403, 62 Sol. Jo. 519,—both cases of provided accommodation,—in which the court arrived at the opposite conclusion.

The following cases were also referred to: *Stewart v. Longhurst* [1917] A. C. 249, 86 L. J. K. B. N. S. 729, 116 L. T. N. S. 763, 33 Times L. R. 285, 61 Sol. Jo. 414, 10 B. W. C. C. 266, Ann. Cas. 1917D, 196; *Cross, Tetley & Co. v. Catterall*, cited in *Sharp v. Johnson & Co.* [1905] 2 K. B. 139, 145; *Cook v. S. S. Montreal* (1913) 6 B. W. C. C. 220, 108 L. T. N. S. 164, 29 Times L. R. 233, 57 Sol. Jo. 282; *Thom v. Sinclair* [1917] A. C. 127, 86 L. J. P. C. N. S. 102, 116 L. T. N. S. 609, 33 L. T. N. S. 247, 61 Sol. Jo. 350, 10 B. W. C. C. 220, Ann. Cas. 1917D, 188; *Dennis v. White* [1917] A. C. 479, 86 L. J. K. B. N. S. 1074, 116 L. T. N. S. 774, 33 Times L. R. 434, 61 Sol. Jo. 558, 10 B. W. C. C. 280, Ann. Cas. 1917E, 325, 15 N. C. C. A. 294; *Gane v. Norton Hill Colliery* [1909] 2 K. B. 539, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 979, 25 Times L. R. 640; *Rowland v. Wright* [1909] 1 K. B. 963, 77 L. J. K. B. N. S. 1071, 99 L. T. N. S. 758, 24 Times L. R. 852; *Morris v. Mayor of Lambeth* 10 B. R. C.

(1905) 22 Times L. R. 22; *Walters v. Staveley Co.* (1910) 4 B. W. C. C. 89, 303, 105 L. T. N. S. 119, 55 Sol. Jo. 579.

Holman Gregory, K.C. (with him **Eastham**), for the respondent. Warrington, L.J., correctly states the legal position in the following passage of his judgment. "The period set apart for the meal in the middle of the day does not, in the absence [761] of some other circumstance, create an interruption in the employment, and it certainly does not where the workman takes his meal, with the employer's permission, upon the premises upon which he is engaged." That was the ground of decision in *Blorell v. Sawyer* [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105, and it is correct. If a workman goes home to his meals then other circumstances arise which take the case out of the act, and he does something outside the course of his employment; but so long as he remains on the employer's premises and is only doing something which is contemplated by the contract of employment, then he is within the act. Taking meals on the premises is a natural incident of the employment. Where the contract of employment is for the day that necessitates working for a certain number of hours, it necessitates also pausing for the purpose of taking food. It is said that the respondent was not upon the works at the time of the accident, but at the present time large works include dining rooms and canteens. It cannot be said that a modern factory includes only a workshop, and it would have made no difference in this case if the factory had been under the same roof. The contract of service with the respondent entitled her to the use of this room as part of her service. She was, therefore, in the course of her employment. The provision of a canteen for the workmen is part of the carrying on of the factory, and, as the Master of the Rolls said, the respondent was entitled as a term of her employment, express or implied, to use the canteen.

Rigby Swift, K.C., in reply. The act never contemplated that compensation should be paid when an accident occurs, not when the workman is doing what he is employed to do, but when he is taking advantage of the facilities provided by the employer.

The House took time for consideration.

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Viscount Finlay: My Lords, this is a claim for compensation under the Workmen's Compensation Act 1906. It came before the judge of the county court at Manchester. He found that the accident arose out of and in [762] the course of the employment, and his decision was affirmed in the Court of Appeal by the late Master of the Rolls and Warrington and Duke, L.JJ. The employers, Armstrong, Whitworth, & Company, have appealed to your Lordships' House. [His Lordship stated the facts and continued:] The question is whether the personal injury was "by accident arising out of and in the course of the employment."

The meaning of these words was very fully considered by your Lordships' House in the case of *Davidson v. M'Robb* [1918] A. C. 304, [1918] S. C. 66. The conclusion arrived at in that case is thus stated in the headnote in the Law Reports:—

" 'In the course of the employment' does not mean during the currency of the engagement, but means in the course of the work which the workman is employed to do and what is incident to it; and absence on leave for the workman's own purposes is an interruption of the employment."

This expresses the considered opinion of four out of the five peers present at the hearing (the Lord Chancellor, Viscount Haldane, Lord Dunedin, and Lord Atkinson), and the fifth (Lord Parmoor), while confining his judgment to the question whether the accident arose out of the employment, in no way dissented from the views of his colleagues as to the meaning of the words "in the course of employment." The views expressed on this point form an integral part of the reasoning on which the judgments of three of their Lordships rested. By some inadvertence the word "semble" has been prefixed to this paragraph in the headnote in the Law Reports.

It is therefore now settled that for the purposes of the act the accident must be in the course of the work or what is incident to it.

Before *Davidson v. M'Robb*, *supra*, there was an impression that the words "course of the employment" denoted merely the currency of the engagement, and on this reading they added practically nothing to the requirement that the accident must arise

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"out of" the employment. In one case to which I shall refer later on (*Blovelt v. Sawyer* [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105), it was held [763] that the accident arose out of the employment where it was caused by the fall of a wall on the employer's premises on which the workman was permitted to remain during the dinner hour to eat his dinner. This decision was explained by Farwell, L.J. (*Gilbert v. S. S. Nizam* [1910] 2 K. B. 555, 558, 79 L. J. K. B. N. S. 1172, 103 L. T. N. S. 163, 26 Times L. R. 604, 3 B. W. C. C. 455), as proceeding on the principle that the workman was permitted to be there by virtue of his contract of employment. In a sense such a case is one of accident arising out of the employment, because it is as an employee that the man was allowed to remain there. It certainly is not "in the course of the employment," as all work was stopped during the dinner hour, but it would have been so if "course of the employment" meant merely the currency of the engagement as was formerly supposed.

In my view the present case is determined by the interpretation of the act adopted in *M'Robb's Case* [1918] A. C. 304, 87 L. J. P. C. N. S. 58, 118 L. T. N. S. 451, 34 Times L. R. 213, 62 Sol. Jo. 347, 10 B. W. C. C. 673, 55 Scot. L. R. 185. The accident did not take place in the course of the work or what is incident to it.

The accident happened between 1 and 2 in the afternoon. As the employes must leave the works at 1 p. m., returning at 2, this interval is for all purposes on the same footing as the interval between the cessation of work in the afternoon and the resumption of work next morning. It is shorter, but so long as it lasts the service is entirely suspended. There is no work during that hour. The claimant was bound to leave, and did leave, the work premises; she came out into the street, and she ceased to be engaged on her master's business when she came into the street, just as much as she would when leaving at the end of the working day. Till 2 o'clock she was absolutely her own mistress, and there was no obligation upon her to go to the canteen for her dinner,—she might have gone to any restaurant or to her own home.

The question may be illustrated by considering what would
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have been the result if the accident had happened in the street during her short passage from the exit to the canteen, by coming into collision with a passing vehicle or by slipping on the pavement. Could she, in such a case, have claimed under the Workmen's Compensation Act? I think it is [764] clear that she could not, but this would result not from the fact that the accident would have been due to dangers incident to traffic in the street, but from the fact that her work had for the time ceased when she passed out into the street from the works. If she had been still "in the course of her employment" she could have recovered under the act in respect of a street accident. This was settled by the decision of your Lordships' House in *Dennis v. White* [1917] A. C. 479, 86 L. J. K. B. N. S. 1074, 116 L. T. N. S. 774, 33 Times L. R. 434, 61 Sol. Jo. 558, 10 B. W. C. C. 280, Ann. Cas. 1917E, 325, 15 N. C. C. A. 294. To say that the employer would not be liable for dangers of the street encountered by the workman if he was still in the course of his employment would be to relapse into the fallacy which influenced a series of decisions in the Court of Appeal (differing on this point from the Scottish courts) that a workman cannot recover under the act in respect of a danger of the street which is shared by all members of the public using the streets under the like conditions. If the workman was in the street in the course of his employment he can recover in respect of injury from such ordinary street risks. The only question is whether he was there in the course of his employment. This is well illustrated by the very recent decision of the Court of Appeal in *Bell v. Armstrong*, 12 B. W. C. C. 138, 146. In that case a woman munition worker upon a night shift, having been released for an hour's interval for supper at 10 p. m., was "clocked out" of the works, and while crossing a public road outside, in order to reach a canteen provided by the employers in their own premises a short distance away for the exclusive use of their staff of workers, was knocked down in the dark by a motor lorry and killed. She was under no obligation to go to the canteen, but might have stayed in the works if she had brought her own food with her, and consumed it there, as many others did. It was held that as the deceased had left the works and gone into the street for her own purposes, and

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not in pursuance of any duty which she owed to her employers, the accident did not arise out of or in the course of the employment. That case was decided on May 7, 1919, by the Master of the Rolls and Warrington and Duke, L.JJ., a few days before the case now under appeal.

[765] The distance in that case between the works and the canteen was 120 yards. The Master of the Rolls rested his decision entirely on the ground that the employee was not in the street on her master's business, and said:—

"If, on the other hand, the servant is in the street either for his own pleasure or for some necessary purpose of his own, some purpose of business, even the purpose of obtaining food, then the servant is there on his own business, and is not there in respect of any duty which he owes to the master."

The Master of the Rolls went on to quote the decision of the House of Lords in *Parker v. S.S. Black Rock* [1915] A. C. 725, [1915] W. N. 204, 84 L. J. K. B. N. S. 1373, 113 L. T. N. S. 515, 31 Times L. R. 432, 59 Sol. Jo. 475, 8 B. W. C. C. 327, Ann. Cas. 1916B, 1290. The other members of the court concurred, and a passage from Lord Atkinson's judgment in *Davidson v. M'Robb* [1918] A. C. 327, was quoted as an accurate statement of the law:—

"The words 'in the course of the employment' mean, I think, while the workman is doing something which he is employed to do."

Everything that was said in the Court of Appeal in *Bell v. Armstrong* (1919) 12 B. W. C. C. 138, [1919] W. N. 151, 88 L. J. K. B. N. S. 844, 121 L. T. N. S. 258, 35 Times L. R. 479, 63 Sol. Jo. 533, would be directly applicable to the present case if the accident had happened in the street between the exit from the works and the entrance of the canteen. There, as here, the canteen was the property of the employer, and was kept up for the benefit of the workmen. The fact that the distance was, there, 120 yards from the works, while here it was 3 yards or so, cannot make any difference in the legal principle applicable.

The course of employment had ceased when the claimant got into the street. Did it begin again when she entered the canteen? Such a conclusion seems to me impossible if cases under the Work-
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men's Compensation Act are to be governed by any legal principle. It was not in pursuance of any duty to her employers that the claimant went into the canteen, and the accident did not result from any obligation which had to be satisfied in order to perform the duties of her employment.

[766] It is necessary to consider carefully the precise grounds on which the Court of Appeal held that this accident happened in the course of the employment and distinguished the present case from *Bell's Case*, *supra*; in which the same judges had decided that the accident did not happen in the course of the employment.

The Master of the Rolls said (appendix, p. 18) that the employees of the class of the applicant were entitled as a term of their employment, either expressed or implied, to use the canteen. He went on to point out that this is a case in which the accident happened upon the employer's premises and upon the part of the premises which was set apart for the use of the employees during their meals; a part of the premises, therefore, upon which the employees were entitled to be at the time when the accident happened. He distinguishes *Bell's Case* by saying:—

“In my judgment this case is wholly different from that case. In *Bell's Case*, the accident occurred in the public street. It was an ordinary street accident. This was an accident that occurred within the employers' works, within the employers' premises, though not upon the part of the premises where the machinery shop in which the applicant was usually engaged was situate, but still upon a part of the premises and works where the employee was entitled to be as a term of the contract with her employer. Now, in the ordinary way, for a street accident the employer is not liable unless it can be shown that the employee was in the street on the business of, or as a duty that she owed to, the employer. The present case is one of a different character. It is where the accident happened whilst the workman is actually on the employer's premises and during the course of the employment, because the course of the employment is not interrupted by the workman's having to take adequate food.”

The decision of the county court judge, which was affirmed in 10 B. R. C.

the Court of Appeal, proceeded mainly on the ground that the works and canteen were part of [767] the premises of the appellants, but he added another ground:—

“I am also of opinion that in hurrying down the stairs in order to get into the works while the hooter was sounding the applicant was doing something equally for her own benefit and for that of the employers. It was for her own interest to ‘clock on’ while the hooter was still sounding, and it was in the interest of the employers that their workpeople should be punctual. Even if there had been a break in the employment, the employment had restarted as she was in the act of ‘clocking on.’ ”

I shall say nothing about this second ground except that, if it were valid, it would apply just as much to the case of an accident to the employee while hurrying down the steps of her own house on her way to work in the morning.

The decision of the Court of Appeal rests entirely on the fact that the accident took place upon the employers’ premises. This is quite true, but it was not on any part of the premises on which work was carried on, and the claimant was not in the canteen in pursuance of any duty to her employer. On what legal principle can it be held that the fact that the canteen is within the same outer wall as the workshop shows that the claimant was there in the course of her employment?

The counsel for the respondent did not rest his argument upon the fact that the canteen was within the inclosure in which the works were. He contended that the same result would have followed if the canteen provided by the employers had been at some distance from the works. In my opinion it is indeed impossible to distinguish between the two cases, and if the respondent is in the right here it would follow that the employer, by providing a canteen where his employees may have their meals comfortably, extends the operation of the Workmen’s Compensation Act to any premises on which the employer has made provision for the comfort of his employees at any distance from the works.

Such a principle could not be confined to the case of a canteen. It would be just as applicable to any provision made by the employer for the recreation of his workpeople. [768] It would apply to a bathing place in the river, to a football or cricket field,
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and to a library. It is very common, I believe, in large towns, to have bedroom accommodation over the shops and other business premises for the use of the employees. Would the employer be liable for an accident which occurred to an employee by a fall whilst going upstairs or in his bedroom? Surely not. Such an accident would not be in the course of the employment and does not arise out of it. It arises out of the provisions made for the welfare of the servant when off duty, which had nothing to do with the service itself.

The question may be illustrated by reference to *Parker v. S.S. Black Rock* [1915] A. C. 725, [1915] W. N. 204, 84 L. J. K. B. N. S. 1373; 113 L. T. N. S. 515, 31 Times L. R. 432, 59 Sol. Jo. 475, 8 B. W. C. C. 327, Ann. Cas. 1916B, 1290. A fireman had contracted by articles which provided that the crew were to find their own provisions. He went ashore with leave to buy provisions, and, when returning, fell from the pier and was drowned. The House of Lords held that, as the deceased was on shore for his own purposes, and not in fulfilment of any obligation imposed on him by the contract of service, the accident did not arise out of his employment. Lord Parker of Waddington said (at p. 729) that the struggle had been to show that the absence from the ship was in pursuance of a duty owed to the employer, but that this contention failed. So here, it was not in pursuance of any duty to the employer that the respondent went to the canteen. We are always driven back to the point upon which the Court of Appeal's judgment rested, that the accident happened in the course of the employment because the canteen was on the employers' premises. What bearing can this have on the "course of the employment," particularly when the canteen was in a building separate from that in which the work was carried on, and specially appropriated to the taking of meals? If there is anything in the contention it must equally apply, as indeed was argued by the respondent's counsel, to canteens provided by the employer for his workpeople at a distance from the works, and, if so, it would seem to follow that the workman would be in the course of the employment while going to this canteen through the streets, and that the employer would be lia-

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ble for any street [769] accident that befell him during the transit to or from the canteen.

Philbin v. Hayes (1918) 11 B. W. C. C. 85, 119 L. T. N. S. 133, [1918] W. N. 166, 87 L. J. K. B. N. S. 779, 34 Times L. R. 403, 62 Sol. Jo. 519, brings out very clearly the irrelevancy for this purpose of the employer's ownership of the premises where the accident happened. In that case huts were erected by a contractor on the premises, and the workmen were allowed to live in these huts at a small charge. An accident happened to a workman by the fall of the roof while he was sleeping in one of the huts on the premises. It was held by the Court of Appeal that the employer was not liable. The huts there were used for residence and repose; the canteen here is used for taking meals. It appears to me that no distinction can be drawn between *Philbin v. Hayes*, *supra*, and the present case. "The necessity for food," as was said by Farwell, L.J., "no more arises out of his employment than the necessity for sleep." *Gilbert v. S. S. Nizam* [1910] 2 K. B. 558, 79 L. J. K. B. N. S. 1172, 103 L. T. N. S. 163, 26 Times L. R. 604, 3 B. W. C. C. 455.

Anything which is incident to the work is covered by the course of employment, but to say that taking meals or taking sleep is incident to the work is surely a most unjustifiable extension of the scope of "incident." In the case of a night watchman who has to be on the premises all night, both meals and sleep are in the course of his employment. He is discharging his duty by being on the premises and guarding them, and while doing this he is entitled to take some repose and some refreshment. The same thing applies to domestic servants. But a job of that sort differs for the present purpose absolutely from the case of a workman who takes his food and sleep when off work. The night watchman is at work while he is taking his food or sleeping; the workman who takes his food during the dinner hour is off work. The two decisions of the Court of Appeal in the present case and in *Philbin v. Hayes*, cannot stand together. They are mutually destructive unless all attempt to decide cases of this kind on principle is to be abandoned as hopeless. In my opinion *Philbin v. Hayes* was rightly decided, and the decision in the present case was wrong.

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[770] Some other cases have been referred to. In *Rowland v. Wright* [1909] 1 K. B. 963, 77 L. J. K. B. N. S. 1071, 99 L. T. N. S. 758, 24 Times L. R. 852, a teamster was in the stable in the course of his duty with his horses. While there he ate his dinner, and was bitten by the stable cat. It was naturally held that eating his dinner did not put an end to the course of his employment. In such a case the workman recovers compensation not because he is eating his dinner, but because he was on the spot in the course of his employment.

In *Blovelt v. Sawyer* [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105, to which I have already referred, the accident to the workman was during the dinner hour, while he was eating his dinner on the premises. There was no rule as to the workman going or staying during the dinner hour, and he was at liberty to do either. While he was eating a wall fell upon him. It was held that during the dinner hour there had been no break in the employment of the workman, and that he was entitled to compensation under the act. With reference to this case Farwell, L.J., said in *Gilbert v. S.S. Nizam* [1910] 2 K. B. 538:—

“The workman has to prove that the accident arose out of as well as in the course of his employment. The necessity for food no more arises out of his employment than the necessity for sleep. The man who is crushed by a falling wall of his employer’s premises while he is eating his dinner recovers compensation because he is entitled to be on the spot by virtue of his contract of employment (as I have explained in *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, 545, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 979, 25 Times L. R. 640), notwithstanding that, and not because, he was eating his dinner; but it is no part of his contract of employment that he should go home or eat or drink or sleep at home or anywhere else.”

In *Blovelt’s Case*, *supra*, the workman was upon the working premises, while in the present case the respondent was in the canteen, which was devoted to the taking of meals. But I cannot think that *Blovelt’s Case* would have been so decided if it had been subsequent to *M’Robb’s Case* [1918] A. C. 304, 87 L. J. P. C. N. S. 58, 118 L. T. N. S. 451, 34 Times L. R. 213, 62 Sol. Jo. 10 B. R. C.

347, 10 B. W. C. C. 673, 55 Scot. L. R. 185, in this House. [771] If a workman, when eating his dinner, is not doing anything for his master, how can it be that the mere permission to remain on the premises while he takes his meals renders the master liable? The permission to be there during an hour when work is entirely suspended does not constitute a continuance of the course of employment. It would be another case if there were no dinner hour with its suspension of all work, and the workman merely snatched a hasty meal at the place of his work. There might be said in such a case to be an uninterrupted continuance of the employment. There is a short suspension of actual work during a short absence for any necessary purpose, going to a lavatory for instance, but there is no suspension of the course of employment. But as soon as you have an hour during which work necessarily ceases, the workman, whether he is permitted to remain on the premises or not, cannot by remaining there be said to be continuing the course of his employment. The test is not whether the workman was on the employer's premises by his permission, but whether he was there on his employer's business. If he is there merely because the employer permits him to remain there, whether such permission is an implied term of the employment or not, he is not during the dinner hour engaged on his master's business any more than if he went out for his dinner.

Farwell, L.J., was right in saying that the taking of meals is rather against its being in the course of employment, but I think he was not right in saying that the right to be at the place decides that it is. The question must remain whether what he was doing can be considered as part of the service. In the present case the taking of the meal was not part of the service, as Farwell, L.J., pointed out in emphatic terms in the passage which I have just quoted.

It is not necessary in this case to consider what the result would have been if it had been a term of the engagement that the workman should take his meals at the canteen. It might be made a term of the employment that the workman should join the cadet corps of the factory and should attend the drills. The employer might build a chapel on his [772] premises and make

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it a term of engaging a workman that he should attend the services there. It might be a term of the employment that the workman should sleep in the building. Some such case may come before your Lordships on some other occasion. Much might depend on the question whether such a term were in its nature purely collateral or might be considered as relating to the "employment" itself.

In my opinion the decision in this case was erroneous, and should be reversed, with costs here and below.

Lord Dunedin: My Lords, if the respondent here was in the course of her employment then I do not think it could be said that there was no evidence on which the county court judge as arbitrator could find that the accident arose out of her employment. The slippery steps were a danger of the employment. The more difficult question is, Was she in the course of her employment? My Lords, I said what I had to say in that matter in the recent case of *Davidson v. M'Robb* [1918] A. C. 304, 321, and I do not propose to repeat myself. But I will venture to quote one sentence: "The words 'course of employment' connote the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work,—*e. g.*, in the workman's case the taking of meals during the hours of labor." Had the girl been allowed an interval for her meals in the works, then, although the accident happened during her meal-time, according to what I said there she would have been in the course of her employment; for she might be held to be taking her meal during her hours of labor. The judgment in this case proceeds on the view that that was the case here. I cannot reconcile that with the distinct finding on the part of the arbitrator as to what happened at 1 o'clock. He says: "It is a rule at the works that all employees should leave the premises at 1 p. m. for an hour. They leave by the exit from the works in North street. The employees then are free to go where [773] they like, either to obtain dinner or for any other purpose. They have all to return and 'clock on' at 2 p. m., when the hooter sounds." That
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finding seems to me to make it impossible to say that she was in the works during that hour, or occupied at a meal during her hours of labor. Why "clock on" if labor was not interrupted? The mere fact that the canteen is on the same plot of ground as the works does not, so far as I can see, alter the position. The ownership of premises, as I said in *Stewart's Case* [1917] A. C. 249, 86 L. J. K. B. N. S. 729, 116 L. T. N. S. 763, 33 Times L. R. 285, 61 Sol. Jo. 414, 10 B. W. C. C. 266, Ann. Cas. 1917D, 196, *per se*, settles nothing. The canteen here might just as well have been in another place altogether, separate from the plot on which the works stood. If so it would have been, I think, quite impossible to say that a girl going there instead of going to her own home was doing something so connected with her employer's work as to be in the course of her employment. The test seems to me to be, not the situation of the premises, but whether resort to the premises is a part of the duty owed to the employer.

The finding I have quoted seems to me to negative that. Nor can I myself take the view of the situation which is taken by others, that the canteen is practically in the position of an access to the works, and that an accident there is really an accident within the works happening to a workman hurrying to his work. I am therefore of opinion that the appeal should be allowed.

Lord Sumner: My Lords, the controversy in this case turns on the words "in the course of." As the respondent was hurt by slipping on her employers' slippery stairs, the accident arose "out of" her employment, if she was then "in the course of" it at all.

These words have been discussed in many cases. In *Davidson v. M'Robb* [1918] A. C. 304, 87 L. J. P. C. N. S. 58, 118 L. T. N. S. 451, 34 Times L. R. 213, 62 Sol. Jo. 347, 10 B. W. C. C. 673, 55 Scot. L. R. 185, a decision was given upon them which is, I hope, final, and it only remains to apply it. There is some difference in the exact language used by the different noble Lords who took part in that case in paraphrasing or explaining the words of the statute, but for the present purposes it is not neces-
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sary [774] to inquire what difference in meaning, if any, there may be between these varying expressions.

It is clear now that the question is not merely one of the determination or discontinuity of the relation of employer and employee. The currency of the engagement is not the test. There cannot be employment where one party no longer employs and the other is no longer employed, but there may be a break in "the course of the employment" in the sense of the statute, though the currency of the contract is unbroken and the legal nexus is subsisting. At the appellants' works the respondent's contract of employment seems to have been by the week. It did not break off at 1 o'clock and begin again at 2, but, apart from the fact that the respondent had to come back to her work, she had nothing to do for her employer that she was employed to do after she reached the canteen.

This case is one of the very large class in which the "dinner hour" is emphatically the employee's own time. It is not one where the employee is bound to stand by during mealtimes, being liable to be called on and to have the continuity of his meal broken by the intervention of some immediate summons or duty. Here the works stopped and were cleared for an hour. This, however, is not conclusive.

My Lords, I cannot accept the argument that a workman gets his dinner "in the course of" his employment merely because he must get his dinner some time or other, because we must all eat to live. Dining is "ancillary" and "incidental" to his continued utility no doubt, but that in itself does not make him dine in the course of his service, nor is dining for that reason part of his service.

This, however, is not all, nor is it conclusive to say that all work was suspended for an hour. The "dinner hour" is not a mere question of sixty minutes by the clock, nor does a cessation of work at the machine from 1 o'clock to 2 preclude the possibility that, during those sixty minutes and while doing something else than work at the machine, the respondent was "in the course of" her employment for the purposes of the act. The pinch of this case arises from [775] the fact that she had finished her dinner and had left the canteen and was coming down the stairs, which
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were the provided means of access from part of her employers' premises to the particular part where the machines were, when she slipped and fell. I think there was evidence on which the arbitrator might find, as he did, that the stairs were part of the premises where the respondent was employed.

Accordingly this case need not be decided, one way or the other, on the ground that the canteen was part of a "welfare" undertaking, to which, under the terms of their employment, the workpeople had a right but no duty to resort, or on the ground that the canteen, though premises of the appellants was not part of the premises where the workpeople were employed on the machinery. I by no means wish to decide that when the respondent availed herself of the option of using the canteen, which her contract of employment gave her, it might not be said of her, to quote *M'Robb's Case* [1918] A. C. 314, that "a workman who by the terms of his employment takes his meals on his employer's premises is in the course of his service in being there at meal times." Be that as it may, I do not see how the case can be any worse for the respondent, because, in the exercise of a contractual right, she resorted to the canteen instead of availing herself of the cessation of regular work to go somewhere else. Equally in either case she has to come back, and, in the dinner hour, just as at the beginning and end of the day, the course of the employment may extend to traversing the means of egress or regress provided by the employer for that purpose. Had the accident happened in the street the case might well have been different.

The respondent was returning from the place where she had dined, down the stairs provided for her return, the use of which exposed her to a risk to which members of the public were not exposed just because they had no right to be there, not being the appellants' employees, for the purpose of regaining the place where she worked via the place where she "clocked on." It is a question of fact for the arbitrator to determine where the area begins over which it is an [776] incident of her employment to go, an "incident naturally connected with the class of work she had to do," and which, in fact, she was just going to do. This was said to be so with regard to the dock in *M'Robb's Case* 10 B. R. C.

[1918] A. C. 309, 322, 87 L. J. P. C. N. S. 58, 118 L. T. N. S. 451, 34 Times L. R. 213, 62 Sol. Jo. 347, 10 B. W. C. C. 673, 55 Scot. L. R. 185. It is no less so in the present. The steps were close to the place for "clocking on" and were part of the same structure, nor were they separated from the workshop, so far as appears, except by an inconsiderable intervening space. As a question of fact the arbitrator decided this in the respondent's favor, finding that the canteen and the rest of the works formed one entire premises, and there was evidence on which he could do so. That it is a question of law seems to me to be suggested only on the ground that the stairs were not part of the works, but of the canteen. They were, in fact, the means of communication between the two. While an internal door at the bottom of the stairs was kept locked, as it was, a few steps down the street from one door to the next had to be interposed, but I do not see that this constitutes a legal chasm or insulation between one part of the same building and another. At night the internal door is open, and access to the works from the canteen via the stairs is all within the curtilage of the appellants' establishment. Surely we cannot hold as a matter of law that returning to work by the stairs is in the course of the employment by night but not by day. I cannot agree with the proposition that "she came out into the street and she ceased to be engaged on her master's business when she came into the street," if this is a proposition of law.

If it is one partly of law and partly of fact I think that, unless based on a finding by the arbitrator, it is inapplicable where the street is the passage between door and door close together. There is no such magic about a highway in such a connection. Again, in a sense the employers carried on two businesses,—one of catering and the other of manufacturing,—but the whole object of the first was the welfare of those employed in the second, and no principle of law is involved in the distinction. After all, welfare work in a mill is, let us [777] hope, for the benefit of all parties in the long run, and, if an employer does extend the area of his liability under the act by providing for the comfort of his workpeople, that cannot affect the construction of the section. If the canteen had been at a distance, or if it had been carried on
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for profit, the case might be different, but no opinion need be expressed about it now.

It seems to me that the arbitrator was entitled to put to himself the question whether the respondent might not be regarded as "in the course of" her employment, while passing down the stairs to the spot where her actual work lay, and whether such passage was not "within the contemplation of both parties to the contract as necessarily incidental to it," whenever she availed herself of the canteen as she was invited and entitled to do. If he did so, there was evidence on which he could find in her favor.

The arbitrator did not actually put this question to himself, nor are his findings of fact, in terms, an answer to it. I think they are such in substance, but I have been obliged to consider carefully whether he ever directed his mind as it was his duty to do. He begins his judgment by remarking that "it must be remembered that this act was passed for the purpose of enabling injured workpeople to obtain compensation, and not for the benefit of insurance companies, and I do not think that it is any part of the duty of county court judges, at any rate, to exercise their brains in trying to draw fine distinctions to prevent the attainment of that object."

I refrain from saying all that might justly be said of this regrettable and unfounded observation. It reduces the value of any conclusions arrived at in accordance with it almost to a negligible quantity. Still we have the evidence, and in any case the respondent, at least, ought not to be deprived of the benefit of the findings, so far as they rest on the evidence, and not merely on the arbitrator's own conclusions.

I think that on the evidence she proved such a case of an accident arising "in the course of" her employment as [778] cannot now be disturbed on grounds of law, and that the appeal fails.

Lord Parmoor: My Lords, in my opinion this appeal should be dismissed. It is not clear on what exact terms the respondent was employed, but it is clear that the employment did not terminate at the dinner hour to start afresh in the afternoon.

The meaning of the words "in the course of employment" has
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been determined in this House in the case of *Davidson v. M'Robb* [1918] A. C. 304 " 'In the course of employment' does not mean during the currency of the engagement, but means in the course of the work which the workman is employed to do and what is incident to it." I think that a midday meal may be incidental to an employment such as that of the respondent, which commenced at 6 in the morning, and that the taking of such a meal did not as a matter of law in itself, and apart from special circumstances, create an interruption in the course of her employment. There are no special circumstances in the present case such as for instance arise when an employee is away from his work not in the course of employment, but for his own pleasure or business.

In the case of *Davidson v. M'Robb*, *id.* 321, Lord Dunedin said, referring to "course of employment:" "It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work, *e. g.*, in the workman's case, the taking of meals during the hours of labor."

This passage supports the view that it cannot be said, as a matter of law, that the taking of meals within the dinner hour cannot come within the course of employment of a workman. The respondent took her midday meal in a room provided by the employers, to which she only had the right of access as an employee under the contract of employment. [779] It was further established, in my opinion, that the room was within the curtilage of and formed part of the premises on which the respondent was employed. These facts are in no sense conclusive in favor of the respondent, but they tend to show that the accident did arise in the course of the employment. They are directly relevant to the consideration whether there was any evidence on which the county court judge could come to the conclusion which he formed. That the respondent, when the accident occurred, was using the stairs, as she was entitled to use them, for the purpose of returning to her work, is a factor which the county court judge was bound to consider in coming to his decision. This case, in my opinion, comes within the category of cases

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which determine that if a workman during the hours of labor, while engaged on a matter ancillary and incidental to the work on which he is employed, meets with an accident in a place provided by his employer, and where he has no right to be except by virtue of his employment, such accident, in the absence of special circumstances, may be incurred in the course of his employment.

It is in this connection that the dock cases and street accident cases are of importance. In the dock cases the general test is whether in going from or returning to his ship the claimant was using an access provided for his use by the employer. In the present case the respondent, in returning to her work, was using an access provided for her use by the appellants. In the street accident cases it has been held that a street accident of an ordinary character, such as all persons using the street might be liable to, does not arise out of employment, or, in other words, that there is no causal relationship between the accident and the employment, which would support a claim for compensation. If, however, as in the bicycle case, the workman is engaged at the time of the accident in the actual work for which he is employed, it will not defeat his claim that the accident was in its character an ordinary street accident. In the present case there is a causal relationship between the employment and the accident, and the claim is not defeated because any person using the stairs in the [780] ordinary way might have slipped with the same consequential injury.

The county court judge has found in the present case that the respondent has discharged the burden of proof which rests upon her. I think that there was evidence before him on which such a conclusion could within reason be found, and that he has not, in so finding, made any error in law.

The appeal should be dismissed, with costs.

Lord Wrenbury: My Lords, the language of the act of Parliament and the decisions upon it are such as that I have long since abandoned the hope of deciding any case upon the words "out of and in the course of" upon grounds satisfactory to myself or convincing to others. In the present case I say no more than that I think that the girl was in the course of her
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employment when, in hurrying down the stairs to achieve punctuality in "clocking on," she was endeavoring to comply with the duty of punctuality which she owed to the employer, and that the stairs being "very slippery," she was exposed to the danger which resulted in the accident by the fact that it was incidental to her employment that she was allowed to be and was in that place.

On these grounds I think that the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 26, 1920.

Solicitors for the appellants: *Collyer-Bristow, Curtis, Booth, Birks, & Langley*, for *R. Sheriton Holmes*, Newcastle-upon-Tyne.

Solicitor for the respondent: *A. E. Pratt*, for *Brooks, Marshall, & Moon*, Manchester.

Note.—Accident to one while seeking or taking refreshment as one arising out of and in the course of his employment within Workmen's Compensation Act.

The above question is covered by the annotation to *Martin v. J. Lovibond & Sons*, 6 B. R. C. 471, to which this note is supplementary.

As shown in the earlier annotation a recovery under the compensation acts has been allowed for an injury sustained by an employee at a time when he was not engaged in active work, but had left off work to secure food.

It will be observed that by a divided court in the reported case (ARMSTRONG, W. & Co. v. REDFORD, ante, 806) it was decided that an injury to a girl employed as a machinist arose in the course of, as well as out of, the employment, where her dinner hour was her own to do as she chose, and, after having eaten at a canteen maintained for employees by the employer on its premises, she fell down the stairs leading to the street, which were the only means of access, it appearing that she was at the time hurrying back to work in order to "clock on" within the time allowed; the view being taken that she was on a part of the employer's premises provided for the use of employees, and that she was hurrying to be punctual in "clocking on."

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And in *Humphrey v. Industrial Commission* (1918) 285 Ill. 372, 120 N. E. 816, an award under the Compensation Act was sustained where the employee was required to take his lunch to the plant, and was permitted and expected to eat it there, and was crushed by an elevator during the noon hour; it appearing that all employees used the elevator during the lunch hour as they had occasion, just as they used it during the hours the plant was in operation.

And in *Johnson Coffee Co. v. McDonald* (1920) 143 Tenn. 505, 226 S. W. 215, the injury was held to have arisen out of and in the course of the employment where the employer allowed its employees to eat their lunch on the premises, and an employee went across the street, procured some lunch, and, as she was going to the third floor to eat her lunch, the elevator, which was operated by someone on the outside thereof, ran past the third floor and she became excited and attempted to get off, and fell into the elevator shaft.

And an injury to a door tender in a mine, which occurred while he was going to get his dinner pail in another part of the mine, was held to have arisen, in the course of his employment, although he was riding on the employer's motor instead of walking. *Blouss v. Delaware, L. & W. R. Co.* (1919) 73 Pa. Super. Ct. 95.

And in *Smidmore v. London & T. H. Oil Wharves* (1921) 14 B. W. C. C. 114, the evidence was held to support a finding that the injury arose out of and in the course of the employment where employees were allowed to take their meals in the employer's shed, in which the latter furnished a fire and table and seats, but no cooking utensils, and an employee, who was waiting for water in a large oil can, which was being used as a kettle, to boil for tea, was scalded when the coal in the grate fell in and the can tipped over.

And in *Martin v. Metropolitan L. Ins. Co.* (1921) 197 App. Div. 382, 189 N. Y. Supp. 467, the injury was held to have arisen out of and in the course of the employment where the employer furnished free luncheon on the twelfth floor of its building to its employees, but there was no elevator service between the eleventh and twelfth floors, and an employee who worked on the eleventh floor, after returning from lunch on the twelfth floor, was injured through the negligence of the elevator operator while she was descending; and this was held true, although the employee was leaving the premises for her individual purposes.

And in *Rowland v. Wright* [1909] 1 K. B. 963, 77 L. J. K. B. N. S. 1071, 99 L. T. N. S. 758, 24 Times L. R. 852, it was held that the injury arose out of and in the course of the employment where one employed in a stable, while eating his dinner therein as he had a right to do, was bitten by a cat which belonged and was kept in the building.

And where the head waiter of a hotel, while eating his luncheon
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furnished under his contract in the hotel, was shot by a waiter whom he had discharged, it was held that his injury arose out of his employment. *Cranney's Case* (1919) 232 Mass. 149, 15 A.L.R. 584, 122 N. E. 266.

And in *Donlon v. Kips Bay Brewing & Malting Co.* (1919) 189 App. Div. 415, 179 N. Y. Supp. 93, where employees who worked in the cellar of a brewery customarily, after eating their lunches, went to the ground floor for air, it was held that an employee was killed in the course of his employment, it appearing that he ate his lunch, and went upstairs, and was found dead at the bottom of the elevator shaft shortly afterward; the court stating that it must be presumed that he was present on the ground floor for one of the legitimate purposes of his employment, and that while so present he fell down the elevator.

And an injury to a city employee, engaged in outdoor work in inclement weather, by the explosion of vapor from a gasolene can in a tool house used in connection with the work, and to which he had gone for shelter while eating his dinner, when he struck a match to light his pipe, arose out of and in the course of his employment, where he violated no rule of his employer and was not aware of the presence of the vapor. *Haller v. Lansing* (1917) 195 Mich. 753, L.R.A.1917E, 324, 162 N. W. 335.

And in *Thomas v. Proctor & G. Mfg. Co.* (1919) 104 Kan. 432, 6 A.L.R. 1145, 179 Pac. 372, a finding that an injury to a girl, who was paid by the hour, occurred in the course of her employment, was held justified, there being evidence that she was injured during the half-hour intermission at noon, and that, although at liberty to leave the premises, she remained therein after eating her lunch and engaged with other employees, in accordance with a custom known to and approved by the employer, in riding on a truck, from which she fell while another employee was drawing it.

And in *Highley v. Lancashire & Y. R. Co.* (1916) 9 B. W. C. C. 496, where one employed on the right of way of a railroad was ordered to go to a certain place with his foreman, and at a point at which they had to change trains, and while they were getting breakfast, the employee was injured in attempting to cross the railroad to get some hot water for tea, it was held that the injury arose out of and in the course of his employment. The court said: "Now, the authorities have said long ago, and I should be extremely sorry to cast any doubt upon them, that a workman who gets his breakfast or his dinner in a place on his employer's premises, a place recognized by the master as proper for that purpose, is, while he is getting the meal with the master's cognizance or acquiescence, not only 'in the course of' his employment, but is doing something which arises 'out of' the employment."

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And where one employed with his team of horses had just eaten his dinner, and for some unknown cause his horses ran away, and in trying to stop them he was run over and killed, it was held that the accident occurred in the course of his employment. *Brown v. Bristol Last Block Co.* (1920) — Vt. —, 108 Atl. 922.

And in *Rainford v. Chicago City R. Co.* (1919) 289 Ill. 427, 124 N. E. 643, there was held to be evidence that an injury to a conductor of a street car arose out of his employment where there was testimony that he had stopped his car, and was on his way to his house near by to have some lunch prepared for him, and was struck by another car as he was crossing the track. The court here said: "To bring an accident within the Workmen's Compensation Act, it must arise out of the employment. The origin or cause of the accident must belong to and be connected with the contract of service. To arise out of the employment the accident must be incidental to performing the contract of service. The accident must also be suffered in the course of the employment in the doing of something which the employee may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing. . . . The question presented to the superior court, therefore, on the motion to direct a verdict, was whether there was evidence fairly tending to prove that the stopping of the car and the act of plaintiff in arranging for his lunch were connected with his contract of service and incidental thereto, and, if so, whether the act of the plaintiff was one which he might reasonably do at the place and under the existing circumstances. Such an act as procuring lunch is reasonably incidental to the performance of the work of an employee, being one of the necessities imposed by nature. That which is reasonably necessary to the health and comfort of the employee, although personal to him, is incidental to the employment and service. *Boyle v. Columbia Fire Proofing Co.* (1902) 182 Mass. 93, 64 N. E. 726; *Sundine's Case* (1914) 218 Mass. 1, L.R.A.1916A, 318, 105 N. E. 433, 5 N. C. C. A. 616; *Milwaukee Western Fuel Co. v. Industrial Commission* (1915) 159 Wis. 635, 150 N. W. 998; *Archibald v. Workmen's Compensation Comr.* (*Archibald v. Ott*) 77 W. Va. 448, L.R.A. 1916D, 1013, 87 S. E. 791. The plaintiff was still on the tracks of the defendant at the time of the accident, and it does not follow that there would have been a liability for an accident happening at a restaurant or at his home. The decision in *Nelson R. Constr. Co. v. Industrial Commission* (1919) 286 Ill. 632, 122 N. E. 113, was on the ground that the injury occurred when McGhan was using a way which he had no right to use, in violation of his instructions, but in this case the injury was received as a natural incident of the employment. The court did not err in refusing to direct a verdict."

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In *Racine Rubber Co. v. Industrial Commission* (1917) 165 Wis. 600, 162 N. W. 664, it was held that an employee at the time of the accident was performing service "growing out of and incidental to his employment" within the Wisconsin Workmen's Compensation Act where he was employed by a manufacturing concern, and was seated on a large piece of rubber in the factory at the lunch hour eating his lunch in accordance with a custom tacitly consented to by the employer, when a large pile of crude rubber near him unexpectedly fell on him and broke his leg.

But it has been held that there can be no recovery for injuries received during the lunch hour where the employee at the time was in a place where he had no duty to perform and where he was at most a mere licensee.

In *Manor v. Pennington* (1917) 180 App. Div. 130, 167 N. Y. Supp. 424, an accident to an employee of a contractor to do work on certain floors of a building was held not to have arisen out of and in the course of his employment where he ate his lunch in the boiler room, a part of the building under the control of a third person and in which the employee had no duty to perform, and was killed by an explosion while waiting in the boiler room until it was time to return to work. The court said: "How can it be said that this accident was one 'arising out of and in the course of his employment'? The employer's contract was for doing some work on the first and second floors of an existing garage. The forenoon's work had been done and the men had left the work and had gone out for dinner; the evidence is that William Manor had been away from the premises, and that he returned and went down into the boiler room in the basement, to await the time for going to work at 1 o'clock, and at ten minutes before 1 o'clock the boiler belonging to the garage, not to the employer, exploded, with the result as stated. The wholly uncontradicted evidence is that the employer made no use whatever of the basement; his contract did not relate to that part of the building; and if the men went down into that basement to eat their dinner they were as much out of the jurisdiction and control of the employer as though they had crossed the street and entered some other building. The employer was in possession of the first and second floors for the purposes of the work, but his possession did not extend to any other part of the building; and the men, by electing to go into the basement rather than to some other place for eating their dinner, could not impose the duties of an insurer upon the employer during the time that they were lawfully and properly absent from the place of their employment. Manor was not an employee, because he was not engaged in performing any of the work for which he was employed; . . . his injuries did not arise out of his employment in any other sense than that he was, probably, in that locality because

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he was employed upon the first and second stories of the building; but he was not at the time doing anything for the employer, any more than he would have been if he had been waiting in the office of a local hotel for the expiring of the dinner hour. The accident which happened was not due to any risk growing out of the performance of the employer's contract; it was such a risk as arose from the conduct of the garage by its owners, with which the employer had no relation, and the employee could have been performing no service for the master. 'Employee,' as now defined for the purposes of the Workmen's Compensation Law, means a person engaged in one of the occupations enumerated in § 2 or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer' (§ 3, subd. 4, as amended by Laws 1916, chap. 622); and this accident did not occur upon the premises or at the plant of the employer, but upon the premises or at the plant of the Hannan & Henry Garage Company, where neither the employer nor the employee had any rights, except by the license of the owners; it occurred 'away from the plant of his employer,' but not 'in the course of his employment;' he was performing no work whatever; he was awaiting the hour to return to his employment in a part of the premises which were in the possession and control of third persons; and the law does not extend its protection to one thus situated."

And in *Brice v. Edward Lloyd* [1909] 2 K. B. 804, 2 B. W. C. C. 26, 101 L. T. N. S. 472, 25 Times L. R. 759, 53 Sol. Jo. 744, it was held that the injury did not arise out of the employment where a general laborer for employers who furnished a dining room which employees could use if they chose went to a pump room, in which employees were not allowed, and ate his supper on a tank in that room, and in getting off the tank fell into it and was scalded.

In *Clark v. Voorhees* (1921) 231 N. Y. 14, 131 N. E. 553, reversing (1920) 194 App. Div. 13, 184 N. Y. Supp. 888, an injury was held not to have arisen out of and in the course of the employment where one employed as a salesman by a wholesale dealer in fruit and vegetables left his employer's place of business early in the morning for the purpose of going to a restaurant a few hundred feet away for a cup of coffee, and while on the way was struck by an automobile.

And in *Pearce v. Industrial Commission* (1921) 299 Ill. 161, 18 A.L.R. 523, 132 N. E. 440, it was held that an injury from a fall upon the sidewalk, to an employee in a building who had gone for supplies for the noonday lunch, in accordance with an agreement among certain of the employees to purchase such supplies, and prepare and eat them upon the premises of the employer, in preference to carrying cold lunches, did not arise out of his employment.

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In *Brassard v. Delaware & H. Co.* (1919) 186 App. Div. 647, 175 N. Y. Supp. 359, where the claimant was injured while crossing tracks to get a midday meal at a dining car provided for employees, it appeared that he had only arrived the night before, and that he had not reported for work in the morning as directed, and it was held that he was not an employee; and as an additional reason for denying compensation the court said: "Even if claimant was an employee of the appellant, he was not acting in the course of his employment when injured. It is true that an employee is within the protection of the Workmen's Compensation Law [Consol. Laws, chap. 67], not only when actually at work, but also while upon the premises of his employer he is going to or from work, or to or from a meal, or while at a meal which is had upon the premises during a temporary interruption of work. This claimant was not going to or from his work at the time of the injury, nor was he going to a meal during the interruption of his work, for he had as yet not worked at all. Finally, he was not going to a meal upon the premises, which he was permitted to take there; for his card to the boarding house was for supper and breakfast only, and both these meals he had already eaten. He had no right to a noonday meal at the boarding house. Therefore the claimant, even though an employee, was not in the course of his employment when injured."

In *Rochford's Case* (1919) 234 Mass. 93, 124 N. E. 891, where an employee, after returning to the factory from dinner at his home, went into a room in which other employees ate lunch, and through which he had to pass to reach the place in which he worked, and remained there for twenty minutes before the whistle blew, with a girl sitting on his knee, and was injured by a machine on which he placed his hand as he got up from a chair, it was held that there was no connection between the injury and the employment, and that the employee was entitled to no compensation. The court said that conditions might arise where the employee on the way to or on his return from meals might be injured on the master's premises as a rational result of the contract of service, although not actually engaged at the moment in the work for which he was hired.

And in *Gilbert v. Nizam* [1910] 2 K. B. 555, 79 L. J. K. B. N. S. 1172, 103 L. T. N. S. 163, 26 Times L. R. 604, 3 B. W. C. C. 455, where an engineer on a trawler in dry dock went home to dinner at noon and on his way back to work fell into the water and was drowned, it was held that the accident did not arise out of and in the course of his employment within the meaning of the Workmen's Compensation Act.

J. T. W.

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[MANITOBA COURT OF APPEAL.]

THE KING *v.* RUSSELL.

51 D. L. R. 1.

Jury — Criminal prosecution — Several counts — Number of peremptory challenges.

One charged with seditious conspiracy, under an indictment containing several counts, to effect the purposes stated in the several counts, is, in effect, charged with but one offense, and is therefore entitled only to the four peremptory challenges allowed by law, and not to four peremptory challenges on each count.

— Selection — Propriety of question.

There is no error in refusing, in a prosecution for seditious conspiracy growing out of a general strike, to permit a juror challenged as not indifferent to be asked: "Did the strike cause you loss?" since (1) such question has no bearing on the ground of challenge, and (2) the fact of bias is one to be proven by extrinsic evidence.

— Abandonment of objection.

Any error in refusing to permit a juror challenged as not indifferent to answer a question is waived where counsel for the accused abandons the trial of the proposed juror before the triers and without waiting for their verdict.

Evidence — Documents in hands of accused.

Documents found in the hands of the accused are clearly admissible in evidence and are *prima facie* evidence against him, it being inferred that he knows their contents and has acted upon them.

— Documents in hands of co-conspirator.

Documents found in the hands of persons charged with being parties to a seditious conspiracy and relating to it are admissible if they were intended for the furtherance of the conspiracy, and become evidence against others of the conspirators.

— Documents in hands of third persons.

Documents found in the hands of third persons are admissible in evidence against a person charged with seditious conspiracy if they relate to the actions and conduct of the persons charged with the conspiracy or to the spread of seditious propaganda.

Strikes — Seditious conspiracy.

The immunity conferred by a statute providing that no prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act, or causing any act to be done for the purpose of a trade combination, unless such act is an offense punishable by statute, does not extend to a case in which the ultimate object aimed at by a general strike, as declared in public speeches and propaganda, is the overthrow of the existing form of government and the substitution therefor of a dictatorship of the proletariat.

(February 24, 1920.)

APPEAL from a conviction on a charge of seditious conspiracy in connection with the strike in the city of Winnipeg in May, 1919. Conviction affirmed.

[2] **A. J. Andrews, K.C., I. Pitblado, K.C., J. B. Coyne, K.C., W. A. T. Sweatman, and S. L. Goldstine, for the Crown.**

R. Cassidy, K.C., and E. J. McMurray, for the accused.

Perdue, C.J.M.: I do not intend to deal *seriatim* with the many questions reserved or to give written reasons for all the answers upon which the members of the court have agreed.

After the accused had pleaded they refused to sever in their peremptory challenges to the jurors. The Crown then claimed the right to proceed against one of the accused and elected to proceed against Russell. This the trial judge had power to permit. Archibold's *Crim. Pleadings*, 25th ed., pages 193, 1357; *Reg. v. Ahearne* (1852) 6 Cox, C. C. 6.

At the trial the accused was allowed only four peremptory challenges on the selection of the jury. His counsel claimed that the accused was entitled to four peremptory challenges on each count in the indictment on the ground that each count charged a separate and distinct offense. Section 932 of the *Cr. Code* is as follows:—

“932. Everyone indicted for treason or for any offense punishable with death is entitled to challenge twenty jurors peremptorily.

“2. Everyone indicted for any offense other than treason, or an offense punishable with death, for which he may be sentenced to imprisonment for more than five years, is entitled to challenge twelve jurors peremptorily.

“3. Everyone indicted for any other offense is entitled to challenge four jurors peremptorily.”

Each of the first six counts in the indictment charges a seditious conspiracy between the accused and the other persons mentioned, to effect the purposes stated in the several counts. It was the same conspiracy to carry into effect a seditious intention although charged in a different form in the several counts.

The maximum punishment for seditious conspiracy is, in the
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present case, two years' imprisonment. Cr. Code. § 134. The amendment of that section in 9-10 Geo. V. 1919, chap. 46, § 5, does not apply to this case. The jury found the accused guilty on each count and the judge imposed a sentence of two years' imprisonment on each of the first six counts, the sentences to run concurrently. It was in fact a punishment of two years' imprisonment upon these six counts. The seventh count was one for committing a common nuisance, the maximum punishment for which is one year's imprisonment. § 222. The accused was found guilty on this count also and was sentenced to one year's imprisonment, the sentence to run concurrently with that upon the other counts.

[3] Under § 856 of the Code any number of counts for any offenses whatever may be joined in the same indictment, except that to a count charging murder no other than one charging murder shall be joined. Where there are more counts than one, each count may be treated as a separate indictment, and if the court considers it conducive to the ends of justice to do so, it may direct that the accused shall be tried upon any one or more of such counts separately. Cr. Code, § 857. In *Rex v. Lockett* [1914] 2 K. B. 720, Sir Rufus Isaacs, C.J., delivering the judgment of the Court of Criminal Appeal, said, at 732:—

“It is apparent that if the facts are in substance the same, the overt acts relied upon are the same, and if the overt acts are the same, then there is no repugnance in these counts, and the consequence is that they may be charged together in one indictment, and there is no ground upon which we can say that the judge was bound to put the prosecution to its election.”

In *The Queen v. Mitchel* (1848) 6 St. Tr. (N.S.) 599, there were joined together in the one indictment counts for feloniously compassing to depose the Queen, for feloniously compassing to levy war against the Queen and to force her to change her measures and counsels. The court, following *Rex v. Blackson* (1837) 8 Car. & P. 43; *The Queen v. O'Connell* (1844) 5 St. Tr. (N.S.) 783, and other cases, refused to put the Crown to its election. The reason assigned was that there was no repugnancy in the different offenses charged, and that they constituted “but one *corpus delicti*, laid different ways.” In the 10 B. R. C.

case at bar the first six counts relate to the same offense of seditious conspiracy. The offense is charged in different ways, but the conspiracy and the overt acts are the same. I would also refer to *Rex v. Kelly* (1916) 54 Can. S. C. 220, 27 Can. Crim. Cas. 282, 34 D. L. R. 311, and to *O'Connell v. The Queen* (1844) 1 Cox, C. C. 413, at 511, 11 Clark & F. 155, 8 Eng. Reprint, 1061, 9 Jur. 25.

In *Rex v. Turpin* (1904) 8 Can. Crim. Cas. 59, the indictment contained a charge for unlawful wounding and also a separate count for common assault; it was held that the accused was not entitled to claim additional peremptory challenges by reason of the addition of the count for assault. The reason, however, given for the decision, was that it was not necessary to add a count for common assault in order to get a conviction for that offense if the evidence warranted it.

Under § 857, Cr. Code:—

“Unless there be special reasons, no order shall be made preventing the trial at the same time of any number of distinct charges of theft, not exceeding [4] three, alleged to have been committed within six months from the first to the last of such offenses, whether against the same person or not.”

If an accused is entitled on such an indictment to a separate set of peremptory challenges on each count he would be allowed thirty-six peremptory challenges, which would be nearly double the number allowed on an indictment for treason or murder, and would exhaust the panel summoned for an ordinary country assize. The practice in this province has hitherto been to limit the peremptory challenges to the number allowed in respect of the most serious offense of those charged in the indictment. This was, in my opinion, the clear intention of the Code. In England the number of peremptory challenges allowed to the accused is determined by the nature of the offense. Where the charge is felony (excepting high treason) the accused may challenge twenty jurors peremptorily. In cases of misdemeanor the accused was not entitled to any peremptory challenges. I can find no mention in the reports of a claim being made to more than twenty peremptory challenges where several counts for felony were joined together in the indictment. In *The Queen v. Mar-*
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tin (1848) 6 St. Tr. (N. S.) 925, the indictment contained fourteen separate counts, each charging a felony or treason felony. The accused was allowed twenty peremptory challenges and no more. (See pages 956, 957, 967.) The same rule should be, and has been, adopted in Canada. Section 932 of the Code affords no reason for making a different rule. In the United States, "the fact that an indictment contains several counts does not entitle defendant to any additional peremptory challenges." 24 Cyc. 361.

Under the English law it was the practice where a juror was challenged for cause to put the reason for the challenge in writing. Issue was joined upon this and the trial proceeded before the triers. See *The Queen v. Martin*, 6 St. Tr. (N.S.) 925, at 963. The onus of proof is on the person challenging. If the ground of the challenge is that the juryman is not indifferept, he is not in general to be questioned as to the fact. It must be proved by extrinsic evidence. *The King v. Edmonds* (1821) 4 Barn. & Ald. 471, 106 Eng. Reprint, 1009, 23 Revised Rep. 350, 1 St. Tr. (N. S.) 785; *The Queen v. Martin*, *supra*, at pages 963-964. The challenges for cause to which an accused person is entitled are set out in § 935 of the Code, and no others except those mentioned in the section shall be allowed. The ground of challenge claimed in this case was under (b) of the above section, that the juror was not indifferent. [5] Counsel for the accused put the following question to the juror: "Did the strike cause you loss?" This question was not admissible upon two grounds: (1) It had no bearing on the ground of challenge that the juryman was not indifferent; (2) there was no right to question the juryman as to that ground.

In any event the objection to the refusal of the judge to allow the question to be asked was waived by counsel for the accused abandoning the trial of the proposed juror before the triers, and without waiting for their verdict.

It might be mentioned that under § 936 of the Code the court may require the party challenging to put his challenge in writing. The form of such challenge is provided by form 70 (Cr. Code).

The acts and declarations of one conspirator in regard to the

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common design are evidence against the others. A foundation should first be laid by proof, sufficient, in the opinion of the judge, to establish *prima facie* the fact of conspiracy between the parties, or, at least, proper to be laid before the jury, as tending to establish that fact.

Taylor on Evidence, 10th ed. page 418, ¶ 590, says:—

“The connection of the individuals in the unlawful enterprise being thus shewn, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is, therefore, original evidence against each of them.”

The conspiracy may be proved by circumstantial evidence, by the detached acts of the persons accused, including their written correspondence, entries made by them, and by documents in their possession relating to the main design. “On this subject it is difficult to establish a general inflexible rule, but each case must, in some measure, be governed by its own peculiar circumstances.” Taylor on Evidence, 10th ed. page 418, ¶ 591.

Counsel for the accused objected to the reception in evidence the fifth question. It would take too much space to discuss these of a great number of documents mentioned in schedule “C” to one by one. They can be divided into three classes:—

(1) Documents found in the hands of the accused; (2) documents found in the hands of persons whom the Crown charges with being parties to the conspiracy; (3) documents found in the hands of other parties which would show the extent of the propaganda.

[6] The documents belonging to the first class are clearly admissible. Writings found in a man’s hands are *prima facie* evidence against him. It will be inferred that he knows their contents and has acted upon them. If they refer to the conspiracy they will be important to show complicity and intention. *Rex v. Horne Tooke* (1794) 25 How. St. Tr. 1, at 120; Taylor on Evidence, ¶¶ 593, 594, 812.

Documents coming under the second class are admissible if they were intended for the furtherance of the conspiracy. Documents found in the hands of parties to the conspiracy and relat-

ing to it become evidence against the accused. *Rex v. Hardy* (1794) 24 How. St. Tr. 199, 452, 475; *Reg. v. Connolly* (1894) 25 Ont. Rep. 151. The parties to the conspiracy may never have seen or communicated with each other, yet by the law they may be parties to the same common criminal agreement, with the same consequences to each other from acts done by one of them or documents found in possession of one of them. *Reg. v. Parnell* (1881) 14 Cox, C. C. 508, 515; *Reg. v. Murphy* (1837) 8 Car. & P. 297.

As to the third class, I think that documents found in the hands of third parties are admissible in evidence if they relate to the actions and conduct of the persons charged with the conspiracy or to the spread of seditious propaganda as one of the purposes of the conspiracy. *Rex v. Wilson* (1911) 21 Can. Crim. Cas. 105; *Rex v. Kelly* (1916) 27 Can. Crim. Cas. 140, 27 Manitoba L. R. 105, affirmed in (1916) 54 Can. S. C. 220, 27 Can. Crim. Cas. 282, 34 D. L. R. 311; *Reg. v. Connolly* (1894) 25 Ont. Rep. 151, 164, 176.

The spread of seditious propaganda in the shape of pamphlets or other printed matter was one of the means by which the purpose of the conspiracy in the present case was to be effected. If such printed matter is found in the hands of a stranger and can be traced as coming from a party to the conspiracy it is evidence against the others. Letters connecting the party to the conspiracy with the act of sending the literature would also be evidence against him and his co-conspirators.

The main objection raised by the defense on this question was as to letters written by one Beatty to Stevenson, the secretary of the Dominion executive of Socialists in Canada. The accused, Russell, was the Manitoba secretary of that party and was in correspondence with Stevenson. The trial judge charged the jury on this point as follows:—

[7] "It is for you to say whether the evidence satisfies you that these persons (including Stevenson), or any of them, were such co-conspirators with Russell. If any of them was a co-conspirator his acts and statements in furtherance of the conspiracy would be evidence against Russell.

"If, on the other hand, the jury is not convinced that any of
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these persons was a co-conspirator, then his acts and statements should not be considered by the jury as evidence against Russell of seditious intention or of conspiracy, and should be disregarded entirely.

"As to such letters as those of Beatty, and as to the statements made by others whom I have not named—there are so many that I will just put it that way and you will understand—as to their acts and statements I would advise you to disregard them, except as to the class of propaganda which is thereby indicated, the extent of such, and the intent thereby disclosed, and those responsible for such propaganda in so far as you may find them connected with the accused Russell."

I think the jury would understand that Russell was not to be made responsible for the acts or statements of any person unless that person had been, to the satisfaction of the jury, connected with Russell in the conspiracy. The letters of Beatty were to be disregarded except in so far as they showed the class of propaganda that was being circulated and the persons responsible for it. But unless the jury found that these persons were connected with Russell in the conspiracy he would not be responsible for their actions in any way.

It was contended by counsel for the defense that the general strike which took place in Winnipeg on May 15, 1919, and continued for more than a month thereafter, was the lawful act of a "trade combination" and that the persons responsible for the strike could not be prosecuted for conspiracy by reason of the protection afforded by § 590 of the Cr. Code. That section is as follows:—

"590. No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is an offense punishable by statute."

A trade combination is thus defined by Cr. Code, § 2, subsec. (38):—

" 'Trade combination' means any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen, or the

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conduct of any master or workman in or in respect of his business or employment, or contract of employment or service."

The offense charged against the accused and others named or referred to in the indictment was seditious conspiracy. This is a [8] statutory offense. Code, §§ 132, 134. There was ample evidence establishing the charge. The conspiracy contemplated the doing of acts which were offenses punishable by statute, such as inducing the servants and workmen employed by the Post-office Department of the Dominion of Canada to go on strike, thereby committing an indictable offense (Postoffice Act, R.S.C. 1906, chap. 66, §§ 125, 126); inducing the firemen employed by the city of Winnipeg to go on strike, thereby endangering life and property (Code, § 499); causing workmen and employees to break their contracts of hiring and abandon their work, contrary to the Master & Servant Act, R.S.M. 1913, chap. 124; causing offenses against the provisions of the Industrial Disputes Investigation Act, 6-7 Edw. VII. 1907 (Dom.) chap. 20, §§ 56 & 57. The above are only a few of the acts punishable by statute which it was the purpose of the conspiracy to commit and which were committed in pursuance of it.

A combination by two or more without justification or excuse to injure a man in his trade, by inducing his customers or servants to break their contracts with him, or not to deal with him, nor continue in his employment, is actionable if it results in damage to him. *Quinn v. Leatham* [1901] A. C. 495, 1 B. R. C. 197, 27 Eng. Rul. Cas. 66. In giving his judgment in that case Lord Brampton said, at 528:—

"A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain an action special damage must be proved."

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Lord Brampton also quoted the statement of the law by Willis, J., which was adopted by the House of Lords in *Mulcahy v. The Queen* (1868) L. R. 3 H. L. 306, at 317, and is as follows:—

“A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such design rests in intention only, it is not indictable. Where two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. . . . The number and the compact give weight and cause danger.”

The statutory provision in England which comes closest to our [9] § 590 is § 3 of the Act of 38–39 Vict. 1875 (Imp.) chap. 86. The first paragraph of § 3 was originally as follows:—

“An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.”

While this clause of the English act stood as above the case of *Lyons v. Wilkins* [1896] 1 Ch. 811, was decided. In that case the officers of a trade-union ordered a strike against the plaintiff manufacturers, and also as against S., a person who made goods for the plaintiff only, and their pickets by their direction watched and beset the works of the plaintiffs and of S. for the purpose of persuading workmen to abstain from working for the plaintiffs. It was held that the picketing and the strike against S. for the indirect purpose of injuring the plaintiffs were illegal acts. Lord Lindley, in giving his judgment, said at page 823:—

“Until Parliament confers on trade-unions the power of saying to other people, ‘You shall not work for those who are desirous of employing you upon such terms as you and they may mutually agree upon,’ trade-unions exceed their power when they try to compel people not to work except on the terms fixed by the unions. I need hardly say that up to the present moment no such power as that exists. By the law of this country no one has

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ever, and no set of people have ever, had that right or that power."

This judgment was delivered in 1896. Kay and Smith, L.JJ., were of the same opinion as Lord Lindley. Kay, L.J., cited § 3 of the Act of 1875 (Imp.), and went on to say at pages 828, 829:—

"There it appears that strikes are legalized by act of Parliament, and that one person would not be indictable for a crime by endeavoring to encourage or bring about that which in itself is not illegal; namely, a strike. Therefore a combination of two or more persons to do this would come exactly within the words of the 3d section of the act, and would not, since this act of Parliament, be an offense against the law. But then it does not go further than that. At present the legislature has simply legalized strikes, and a strike is an agreement between persons who are working for a particular employer not to continue working for him. Also, I take it that under the terms of the section which I have read it is not illegal for a trade-union to promote that strike. But further than that the law has not gone."

Smith, L.J., at page 834, was of opinion that if there had been a trade dispute between S.'s workmen and S. himself the trade-union might have called out his men on strike, but it had no right to call out S.'s men so as to prevent him from working for the plaintiff.

Now if we take our § 590 of the Code, reading it along with subsec. (38) of § 2, we find that no prosecution shall be maintainable against any person for conspiracy . . . for doing any act or causing any act to be done for the purpose of any combination between (1) masters, (2) or workmen, (3) or other persons, for regulating or altering the relations between any persons being masters or workmen, or for regulating or altering the conduct of any master or workman in or in respect of his business or employment or contract of employment or service. In order that the combination may enjoy the immunity provided by the enactment it must have as its purpose at least one of the purposes above set forth.

It is lawful for workmen to combine in a strike in order to get higher wages, because that would be a combination to regulate
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or alter the conduct of a master in his employment of his workmen. Persons who aided or encouraged such a strike would not be committing an unlawful act, because they were endeavoring to bring about something that is legal. But supposing there is a strike by the molders in A's foundry and in order to assist the strike the employees of a cartage company combine in a refusal to carry goods to or from A's foundry, or the railway company's employees combine in refusing to receive or handle A's goods; neither of these combinations comes within the protection afforded by § 590. I would refer to *Reg. v. Gibson* (1889) 16 Ont. Rep. 704, where the effect of the statutory provision as it was in R. S. C. 1886, chap. 173, § 13, is discussed.

"Sympathetic" or "secondary" strikes are no longer "actionable" in England, by the Trade Disputes Act, 6 Edw. VII. 1906 (Imp.), chap. 47, §§ 3 and 5. We have no similar enactment in Canada legalizing such strikes. The law in Canada applying to such strikes would be the same as it was in England before the Trade Disputes Act 1906 was passed. By the law of England as laid down before the last-mentioned act, if two or more persons conspired to incite or to compel another to break a contract it would be a criminal act. *Reg. v. Parnell* (1881) 14 Cox, C. C. 508; *Mogul Steamship Co. v. McGregor* (1889) L. R. 23 Q. B. Div. 598, 616, [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101; *Quinn v. Leatham* [1901] A. C. 495, 510, 511, 529-531, 538, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66; *Giblan v. National Amalgamated Union. &c.*, [1903] 2 K. B. 600, 621, 1 B. R. C. 528, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708.

But I feel that I have been unnecessarily discussing the question in view of the facts proved in this case. The persons who planned and brought about the general strike in Winnipeg of May 15, 1919, [11] were not acting for the purpose of a trade combination so as to entitle them to the immunity provided by § 590. The accused and the other persons who combined with him, being the wing of the Socialist party known as the "Reds," had obtained control of the Trades and Labor Council in the
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early part of 1919. The Trades and Labor Council by resolution decided early in May that a vote should be taken, authorizing the calling of a general strike; it was also decided that the vote of all the unions should be pooled and that the decision of the majority of the pooled votes should govern. Each union therefore was to be bound by the decision of the majority of all the unions. This vote was then taken by ballot and the minutes of the Trades and Labor Council of May 13th show that on that date it was decided by the Trades and Labor Council to call a general strike at 11 A. M. on Thursday, May 15. It was ordered: "Every worker will drop tools at the same moment." When this decision was reached by the Trades and Labor Council it was shown in evidence that the employees of the Winnipeg Electric R. Co. had not completed the taking of their vote and that a number of other unions, such as the telephone operators, commercial telegraphers, barbers, musicians, Selkirk Asylum operators, etc., had not reported. Almost every class of employees in Winnipeg had been organized as a trade-union. These included skilled and unskilled labor, railway employees, street car men, bakers, milkmen, drivers of motor cars, clerks in stores and shops, compositors and other newspaper workers, civic employees, the city firemen, police, electric light and waterworks employees, scavengers, draymen, delivery men, telegraph and telephone operators, postoffice employees, in fact almost every form of labor, service, or employment. On May 15, 1919, a general strike took place. Notice of the strike was given to the employers in most cases on May 14, 1919, and none prior to that date. During a period of six weeks business, industry, and the ordinary pursuits of civil life in Winnipeg were interrupted and the citizens subjected to apprehension and terror. The city was, in effect, in a state of siege. Persons who were willing to work were threatened and driven from work by the strikers. The supplies of food, water, and other necessities were endangered. Riots took place, and injury was caused to persons and property. The overt acts set out in the indictment were proved in evidence. They throw much light on the purpose and intention of the conspiracy.

[12] But it is argued for the defense that all the trade-unions
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that struck had united for one common trade-union purpose, and that this was a trade combination engaged in a legitimate strike. The answer to that argument is that the combination did acts and caused acts to be done which were offenses punishable by statute, and therefore it was not protected by § 590.

The accused has been found guilty upon all the counts set forth in the indictment. There was amply sufficient evidence to justify the jury in making their findings. In fact they could not have honestly arrived at any other conclusion. So far from being a legitimate strike, the combination was in fact, as the jury has found, a seditious conspiracy. To aid a brother trade-union in its strike for higher wages, or to obtain higher wages for all, was not the real object of the combination. What took place before the strike shows that the accused and his associate "Reds" aimed at something much more drastic. Their ultimate purpose, as declared in their public speeches, was revolution, the overthrow of the existing form of government in Canada, and the introduction of a form of Socialistic or Soviet rule in its place. This was to be accomplished by general strikes, force, and terror, and, if necessary, by bloodshed. The Bolsheviks in Russia were greeted and approved. A vast quantity of propaganda in the shape of pamphlets, booklets, printed papers, etc., was distributed by the conspirators as widely as possible. All of this contained matter intended to excite discontent and stir up class hatred, much of it was seditious, some of it was treasonable. The agitation prior to and during the strike showed no desire on the part of the leaders to bring about by constitutional means an improvement in the position of the wage earner or the securing for him of a greater share in the fruits of his labor. Writing to brother Socialists prior to the strike the accused contemptuously refers to the rank and file of the workingmen as the "plugs." It was said by speakers at meetings and in the literature distributed that "revolution, and not evolution," was to be the means employed in accomplishing their purposes. "Capitalism" was to be destroyed and our whole system of government was to be overturned. The accused and his associates advocated a "dictatorship of the proletariat." All industries were to become the property of the workers and be operated "for use, and not for

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profit." Land was to become the property of the state. At the [13] meeting in the Walker Theater in Winnipeg on December 22, 1918, the accused, according to reliable witnesses, made the following statement: "Blood is running in Russia and blood will run in this country from the Atlantic to the Pacific, or we will get our rights." On another occasion he stated that the Soviet government (of Russia) was a better government than our own and predicted that it was coming in Canada. These statements were made to large audiences, many of whom were foreigners, and were received with much applause.

There is one other point to which I might briefly refer. By the English Act, 38-39 Vict. 1875, chap. 86, what is known as "peaceful picketing" is excepted from the enactment making intimidation and picketing in general illegal. § 7. This was adopted in Canada by the Act 39 Vict. 1876, chap. 37, § 2; R.S.C. 1886, chap. 173, § 12. When the Cr. Code 1892 was compiled the exception in favor of "peaceful picketing" was omitted (see § 520) and has never since, so far as I can find, been re-enacted.

I have read the judgments of my brothers Cameron and Deniston and agree with their conclusions. The questions reserved for the opinion of this court should be answered as follows: To the first paragraph of the first question: Yes; the motion to quash the indictment was properly dismissed. To the second paragraph of the said first question: Yes, the motion in arrest of judgment was properly dismissed. To the third paragraph of the said first question: There has been no mistrial. To the second question: Yes. To the third question: Yes. To the fourth question: The trial judge was right in disallowing this question. To the fifth question: The evidence was properly admitted. To the sixth question: Yes. To the seventh question: Yes; the evidence was properly admitted. To the eighth question: Yes; the evidence was properly admitted. To the ninth question: The evidence was properly admitted. To the tenth question: The evidence was properly admitted. To the eleventh question: The verdict is good. To the twelfth question: No. To the thirteenth question: There was no substantial

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wrong or miscarriage occasioned on the said trial. To the fourteenth question: Yes.

Cameron, J.A.: Amongst the questions reserved by the trial judge were several relating to his charge to the jury. One of these is in respect of that portion of his charge dealing with general [14] and sympathetic strikes, and is thus stated: "Did I misdirect the jury as to the legality or otherwise of general strikes and general sympathetic strikes, having relation to this strike." "This strike" refers to the general or sympathetic strike that occurred in this city, commencing May 15 last and continuing in force for six weeks thereafter. The events leading up to and connected with that strike are detailed at length in the evidence, and are well known to the world.

In his charge the trial judge reviewed the history of the law relating to trade combinations and trade-unions in England from the time of Edward III., referred to the legislation of 1824, 1825, 1859, 1871, and 1875 and various well-known decisions of the courts. He also sketched the history of the Canadian legislation, pointing out differences between it and that of England. He referred to the definition of sympathetic strike given in the box by the accused Russell, *viz.*, "When a dispute originates between an employer and his employees, and when the labor organizations see that organization being beat, they come to their assistance by calling a strike to force their employers to bring force to bear upon the original disputants to make a settlement." The trial judge emphasized to the jury the threat of force underlying this statement.

In dealing with the question of strikes and picketing he pointed out that the subsection of the English Conspiracy and Protection of Property Act, 38-39 Vict. 1875, chap. 86, prohibiting intimidation and watching and besetting, which provides that "attending at or near the house or place where a person resides or works or carries on business . . . to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section," was reproduced in the Canadian Act, "An Act to Amend the Criminal Law Relating to Violence, Threats, and Molestation," 39 Vict. 1876, chap. 37.

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This is the provision which was intended to protect and justify "peaceful picketing." But though re-enacted in the revision of 1886, it is not now found in our Code. The trial judge told the jury, and rightly I think, that with us the striker has no more justification for picketing than he obtains by the right of every British citizen to go about his own business in a peaceable way.

That particular portion of the charge which is the subject of the question reserved is as follows:—

[15] "How can a general sympathetic strike, the object of which is to tie up all industry, to make it so inconvenient for others that they will cause force to be brought about, to stop the delivery of food, to call off the bread, to call off the milk, to tie up the wheels of industry and the wheels of transportation from coast to coast; to lower the water pressure in a city like Winnipeg, which since the establishment of modern improvements has no other way in which to carry on its life,—how can such a strike be carried on successfully without a breach of all these matters; without violence, intimidation, without watching and besetting? How can you say, if you exercise your common sense, that those in charge of a strike like that did not intend those things should follow? And, gentlemen, all those things followed. You heard about the Canada bread. No striker may trespass upon my property now to do what they did at the Canada bread. Is it likely to commit a breach of the peace? Gentlemen, if you and I were the Canada bread it would have caused a breach of the peace, I think."

Without going into detail it is plain that the statute law of England relating to trade combinations, trade-unions, combinations of workmen, and strikes, differs in material particulars from that of Canada, and the decisions of the English courts thereon are to be read with those differences in mind. Important provisions of the Trade Disputes Act of 1906 are not to be found in our legislation. So far as the criminal aspect of the matters involved in this case are concerned they must be considered in view of the provisions of our Code. The judgment of Loreburn, L.C., in *Conway v. Wade* [1909] A. C. 506, dealing with the term "trade dispute" and holding the secondary strike justified by the Trade Disputes Act of 6 Edw. VII. 1906, chap. 10 B. R. C.

47, where he says at 512: "The section cannot fairly be confined to an act done by a party to the dispute," is obviously based altogether on the provisions of that statute, and has no application in Canadian law.

There was no contention in this case that there was not sufficient evidence for the jury, and no question was reserved on that subject. In fact the evidence for the Crown was of an overwhelming character and volume. The defense was, therefore, thrown back upon the immunity which, it was argued, was given the accused by § 590 of the Cr. Code, which provides:—

"590. No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is an offense punishable by statute."

"Trade combination" is defined in § 2, subsec. (38):—

(38) " 'Trade combination' means any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or [16] workman in or in respect of his business or employment, or contract of employment or service."

All the acts done or caused to be done by the accused and those with whom he was in combination brought out in the evidence were, it was argued, "for the purpose of a trade combination" and therefore protected by the section. Whether the combination was a single union or a combination of them, and whatever may have been the real purpose for which it was formed, were, it was urged, immaterial considerations in view of the protecting words. From this viewpoint every or any strike is lawful, if not meritorious.

But the concluding words of the section (590), "unless such act is an offense punishable by statute," cannot be overlooked. Clearly, if the acts done or caused to be done, the objects for the accomplishment of which the alleged conspiracy was formed, were offenses punishable by statute, the protection given by the section becomes narrowly confined within certain ascertainable limits.

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In England under the Conspiracy and Protection of Property Act, 38-39 Vict. 1875, chap. 86, an agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute, is not indictable as a conspiracy if such act committed by one person would not be punishable as a crime. This provision does not affect the law relating to riot, unlawful assembly, breach of the peace, sedition, or any offense against the State or the Sovereign. It is, apparently, therefore, somewhat similar to, but with manifest differences from, our § 590, and other than § 590 has no counterpart in our Code.

"A long series of acts culminating in the year 1800 made it a criminal offense for workmen to agree together for the purpose of obtaining in combination higher wages or shorter hours of work. . . . The consequence was that the courts were not called upon to decide whether such a combination constituted a conspiracy at common law, and statements to the effect that it does constitute a criminal offense may be explained by reference to the statutes in force at the time or on the ground that they referred to offenses against the State or of a public nature." 27 Hals., p. 638, ¶ 1195.

These acts were repealed in 1824 and 1825, and notwithstanding some *dicta* to the contrary, "it is now clear that a combination in restraint of trade is not a criminal offense at common law, unless it is a combination in pursuit of a malicious purpose to ruin or injure a person as opposed to a combination for the purpose of a legitimate trade object." *Id.*, p. 639, ¶ 1196.

In 27 Hals., page 601, ¶ 1140, a strike is defined as "a simultaneous cessation of work on the part of workmen. It does not necessarily involve any breach of either the civil or criminal law; for it is not [17] illegal to persuade men lawfully to determine their contracts with their employer or not to work for an employer."

It is pointed out in the note (b), page 601, to the statement that "the word is of an artificial character, and does not represent any legal definition or description."

As to the effect of the provision in the Conspiracy and Protection of Property Act 1875 (Imp.), on the legality of strikes,
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in *Gozney v. Bristol, etc.*, [1909] 1 K. B. 901, 78 L. J. K. B. N. S. 616, 100 L. T. N. S. 669, 25 Times L. R. 370, 53 Sol. Jo. 341, Cozens-Hardy, M.R., said on the argument that the effect was to legalize strikes in the broadest terms, and Fletcher Moulton L.J., said, at page 923, that were a strike illegal at common law (which it was not) then it would have been legalized by the above act.

In *Lyons v. Wilkins* [1896] 1 Ch. 811, 65 L. J. Ch. N. S. 601, 74 L. T. N. S. 358, 45 Week. Rep. 19, 60 J. P. 325, and *Quinn v. Leathem* [1901] A. C. 495, 541, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66, it was held that the provision did not legalize a combination to call out the workmen of A, with whom there was no dispute, in order to prevent A from dealing with B, with whom there was a dispute; but this view is now undermined in England in the light of the definition of "trade dispute" in the Trade Disputes Act 1906, which is not to be found in our Code. The important *dicta* in *Lyons v. Wilkins*, *supra*, of Lindley, L.J., at page 822, of Kay, L.J., at page 828, and of Smith, L.J., at page 833, are, therefore, still applicable to cases arising in Canada where warranted by the facts.

As long as a strike is for a legitimate purpose, such as, for instance, advancing the rate of wages, the fact that injury results to the employer does not thereby alter the character of the act. It is a case of *damnum absque injuria*. The employer may suffer loss or be financially ruined, but under the law as it is, our courts of justice are impotent to give him a remedy. But there are limitations on this rule as "the lawfulness of a strike depends not only on the means used to render it effective, but also on its object. A combination to quit work is lawful only where its purpose is to obtain for the parties a benefit which they can lawfully claim. If the primary object is to injure others in their business or calling, or to deprive them of their liberty of action without just cause, and not to advance the interests of the combination except perhaps in some remote or indirect way, it is unlawful." Corpus Juris, vol. 12, page 570.

[18] The term "sympathetic strike" is also one of artificial
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character, without a fixed legal meaning. It is a vague phrase, elusive in meaning, like "collective bargaining." The term "sympathetic strike" may convey the idea of workmen in certain industries ceasing work voluntarily and without breach of their own contracts to express their sympathy for and moral support of other workmen already on strike. On this continent it is certainly not confined in meaning to any such peaceful demonstration or to the restricted meanings given to it or to the apparently identical term "secondary strike" in England, as mentioned in Cohen on Trade Union Law, 3d ed. 109. Here we have been educated to give the terms "general" or "sympathetic strike" much wider meanings, and to so expand them as to include even the idea which underlies the significant phrase "direct action." The terms imply not only the purpose declared in the definition given by the accused at the trial, which expresses the idea of force brought to bear on employers to compel them to bring pressure to bear upon another employer whose workmen are on an unsuccessful strike, but it may imply more than that. It may even mean a strike which is avowedly declared for the purpose of forcing the action of a government, as, for instance, in compelling the release of a convicted criminal, the abandonment of prosecutions, or for any other similar, or it may be wholly different, object which those in control of trade organizations may decide to attempt to attain by the threat or enforcement of a general or sympathetic strike.

As to the legality of a sympathetic strike, there is a valuable article on the subject appended to the report of *Pickett v. Walsh*, 6 L.R.A.(N.S.) 1067. The author follows the decision of the Massachusetts supreme court in that case, deals with other decisions of the United States courts, refers to *Quinn v. Leathem*, *supra* and *Giblan v. National Amalgamated Union, etc.* [1903] 2 K. B. 600, 1 B. R. C. 528, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708, and thus states his conclusion (page 1075), which seems to accord with our jurisprudence:—

"If the strike is in the nature of a boycott or sympathetic strike—that is, if it involves no trade dispute between the strikers and their employer; in other words, is not a natural incident or outgrowth of the relation of employer and employed—the

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strike cannot be justified and is therefore always an illegal one."

In arriving at this conclusion the writer confines himself to the question of the legality of strikes viewed as strikes pure and simple, and puts out of contemplation (page 1068), [19] "all those matters such as picketing, threats, intimidation, violence, and lawlessness of every description, which unfortunately have been so often the accompaniment of strikes as to make one forget that they are not necessarily incident thereto, and to persuade one, because of such unlawful features, to view all strikes as illegal."

But in the case now before the court we are not called upon to deal with the strike, sympathetic or otherwise, as an abstract proposition, but in connection with the very accompaniments the writer of the note discards in his discussion and with other circumstances of the most far-reaching character.

The definition of general or sympathetic strike given by the accused may be correct so far as it goes and in some cases. But it falls far short of setting forth the true objects in view of the accused and his fellows who precipitated the strike of last summer, and it is a travesty so far as it purports to confine the pressure exerted by the strikers as being brought to bear on employers only. The general strike of last summer was in fact an insurrectionary attempt to subvert the authority of our governments, municipal, provincial, and dominion, and substitute for them an irresponsible "strike committee," an attempt attended for a time with a measure of success which, looked at in retrospect, seems incredible. This "strike committee" issued decrees in the approved Soviet style. It put an end to street car transportation, shut off telephone communication, interfered with the city's water supply, called out the firemen from their posts, and left the city without fire protection until the strikers' places had been filled by volunteers. When the members of the police force, renouncing their sworn allegiance, had voted to join the strikers, the strike committee issued an edict that "ordered" them back to duty. The delivery of milk, bread, and ice was forbidden. Restaurants and eating places were closed save those favored with "permit cards." In the city delivery and transmission of his Majesty's mails were for a time completely stopped. The
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newspapers were suspended and telegraphic communication with the outside world forbidden. The special police force, organized to take the place of the ordinary police force when its members were finally dismissed for disobedience to their lawful superiors, was mobbed and driven from the streets, and the city left practically without police protection. One member of the special police, who had been awarded the Victoria Cross for gallant conduct in the war, was seriously injured [20] and had a narrow escape with his life. In the rioting that occurred subsequently there were numerous casualties and members of the Royal Northwest Mounted Police were assailed with missiles of all kinds, shot at from the streets and roofs of buildings, and several of them wounded. Workers in the hospitals were called from their tasks, and the management of the Winnipeg General Hospital was forced, in the interests of its sick and dying patients, to obtain permission from the strike committee to keep its employees at their posts. A widespread system of espionage, intimidation, and terrorism was organized and executed with relentless vigilance and activity. All these events and incidents and many more are a matter of history and of evidence, and to say that they were merely bringing pressure to bear on certain employers to force other employers to yield to demands made on them is utterly beside the truth. It was a bold attempt to usurp the powers of the duly constituted authorities, and to force the public into submission through financial loss, starvation, want, and by every possible means that an autocratic junta deemed advisable. I cannot see how it is possible to speak of such a revolutionary uprising as a mere "sympathetic" or "general strike." In view of the grim facts, to argue that this outbreak was brought about for the purpose of a trade combination is, to my mind, simply out of the question. The contention put forward on the argument that the consolidation into one organization of all, or nearly all, the trade organizations in the city, which developed or merged during the strike into the One Big Union, was merely a "trade combination" and, therefore, protected by the law, is, in view of the facts, wholly untenable.

But we are not necessarily called upon to consider all of these aspects of the case, vitally important though they may be. We

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can confine ourselves to the saving concluding words of § 590 of the Code referred to, and, on the facts as they were brought out in the evidence and are notorious to the world, and from that viewpoint let us consider what is the precise extent of the protection given by the section.

Seditious conspiracy is defined and its punishment fixed by the Code, § 132. Unlawful assemblies and riots are dealt with in §§ 78 to 90, and nuisances by §§ 221 and 222. There are the sweeping provisions of § 164, making wilful disobedience of [21] any act of Parliament or of any Provincial Legislature, unless some other punishment is provided, an indictable offense. We have the provisions of § 498 dealing with conspiracy in matters of transportation, etc. In § 499 are to be found highly important provisions making it an indictable offense to break a contract with resultant danger to life or property and wilfully to break a contract connected with supply of power, light, gas, or water, and the section declares that malice is no element in the offense. By § 501 it is made an offense punishable on indictment or summary conviction to compel any person to abstain from doing anything he has a lawful right to do by the use of violence, threats, following or watching or besetting. And to this section there is no longer the previously existing proviso which sought to legalize "peaceful picketing" by permitting attending at the house of another for the purpose of communication, as was clearly pointed out by the trial judge.

By § 573 of the Code:—

"Everyone is guilty of an indictable offense . . . who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offense."

This is a most comprehensive enactment. It relates not only to indictable offenses, conspiracies to commit which are not specifically dealt with in the Code, but to offenses indictable at common law. This section alone, in my opinion, closes the door of hope on the accused.

I refer also to the Industrial Disputes Investigation Act, 6-7 Edw. VII. 1907 (Dom.), chap. 20, the provisions of which were flagrantly violated during the strike at the instigation of those directing its operations.

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That there were offenses committed coming within those statutory provisions and brought out in the evidence cannot be disputed. The accused knew that they would take place in the carrying out of the designs to which he was a party. If he did not know he should have known. It is difficult, perhaps impossible, to imagine a set of circumstances in which § 590 would afford immunity, but, however that may be, it is clear that in this case the section is no shield, but an open trap into which the accused has rushed heedless of warnings, and he must take the consequences.

I am convinced that the part of the trial judge's charge to which exception was taken, as formulated in the question I have [22] discussed, is a proper, accurate, and studiously moderate statement of the law on the subject with which it deals.

The greatest number of the questions reserved for the consideration of this court were disposed of on the argument without hearing counsel for the Crown. Amongst those which counsel for the Crown were asked to discuss was that relating to the number of challenges to which the accused was entitled at the trial. There is no doubt in my mind that the accused was limited to four challenges whether this indictment contained one count or seven. This phase of the case is fully dealt with by the Chief Justice in his reasons for judgment, and in addition to the authorities mentioned by him I would refer to this statement of the law from 24 Cyc. 361:—

“The fact that an indictment contains several counts does not entitle defendant to any additional peremptory challenges, even though the different counts charge separate and distinct offenses which may be joined in the same indictment.”

The question of the admissibility of certain evidence was discussed at length on the hearing. I am satisfied the trial judge's ruling on this point was unimpeachable. Such evidence must inevitably be admissible from the very nature of the offense where, as in this case, the conspiracy is on a vast scale and its ramifications are multitudinous and far-reaching, and I agree with the views expressed on this subject by Dennistoun, J.A., in his judgment.

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Haggart and Fullerton, JJ.A., agree with Perdue, C.J.M.

Dennistoun, J.A.: A number of the questions of law reserved for the consideration of this court by the trial judge relate to the admission of documentary evidence consisting of letters written by and to Russell, one of the accused, by members of the Socialist Party of Canada, and also of publications of that party, and of labor organizations which were referred to in the course of the trial. Evidence was also admitted in respect to the Winnipeg general strike and its incidents. Evidence was admitted of what took place at certain Trade and Labor Conventions in different provinces of Canada, and of speeches made and resolutions passed at those conventions. In addition evidence was given of speeches made at certain public meetings held in Winnipeg in December, 1918, and January, 1919.

In proving charges of conspiracy it is generally necessary to throw a wide net and to examine the catch carefully. If it contains [23] evidence which is clearly relevant and pertinent to the charge, such evidence should not be excluded for the sole reason that there may have been included facts or statements or documents which would not otherwise properly come under review. In such a case the duty devolves upon the trial judge to separate what is evidence properly admissible from that which should be discarded, and having done that and having properly warned the jury, to proceed with the trial and take the verdict.

Before proceeding to a consideration of the law, I desire to set out a brief and very incomplete *résumé* of some of the outstanding features of this case as detailed in the evidence taken at the trial, for the purpose of showing the far-reaching and widespread activities of the accused named in this indictment, and the groups of persons, and organizations, with whom they were associated. Having done that, an effort will be made to deal with the points in question, which will have assumed concrete form, and to measure the sufficiency of the warnings which the trial judge gave to the jury in his charge.

The case lasted twenty-three days and an immense volume of evidence has been taken. I can only touch upon a few of the salient points.

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Quebec Convention.

A Labor Congress for the whole of Canada was held at Quebec in September, 1918. Delegates were sent from local and district labor councils. Russell, Johns, and others attended as representatives of the Trades and Labor Council of Winnipeg; Kavanagh of Vancouver and Midgley of Vancouver were present. There was a sharp division between the delegates from eastern and western Canada, the western delegates being the more radical in their ideas.

Certain resolutions were put before the Congress by the western delegates, but were defeated by the moderate section of the Congress.

The western delegates then decided to call a western convention. Russell, Johns, Midgley, and Kavanagh were appointed a committee to call the meeting.

The Walker Theater Meeting.

A meeting was held in Winnipeg on December 22, 1918, under the joint auspices of the Trades and Labor Council and the Socialist [24] Party of Canada. The accused Russell, according to the evidence of the witnesses Langdale and Peters, made a speech in which he said: "Blood is running in Russia, and blood will run in this country from the Atlantic to the Pacific, or we will get our rights. We are willing to wade in blood to obtain what we claim to be our rights." These words were spoken in the course of a speech extolling the existing government in Russia as the only free people's government that the world has ever seen, and the only government under which the workman had ever got his rights or could expect to get his rights. This speech and others of a suggestive though less outspoken character were addressed to a large audience which completely filled the Walker Theater, many of the audience being returned soldiers and many of them aliens. The speeches were received with great applause, and resolutions were passed condemning government by orders in council, demanding the release of political prisoners, the withdrawal of troops from Russia, and sending greetings to the Russian Soviet in Russia. There were ex-

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pressions freely used of an inflammatory character such as "We swear to keep the red flag flying forever;" "Long live the Russian Soviet;" "Long live Karl Leibknecht;" "Long live the working classes." Russell, Queen, Ivens, and Armstrong, who were all named in the indictment, took part in this meeting as speakers. Queen was chairman. It was announced that literature was being generally disseminated through the country.

Majestic Theater Meeting.

A meeting was held in the Majestic Theater in Winnipeg on Sunday, January 19, 1919.

Outside the theater copies of the "Red Flag" were distributed and inside the theater copies of the "Socialist Bulletin" and other pamphlets. The theater was full. The speakers were Armstrong, Johns, Russell, and Blumenburg.

The meeting was stated to be under the auspices of the Trades and Labor Council. The witness Batsford says that about 75 per cent of those present were foreigners.

Russell made a speech in which he praised the Russian Soviet government and said that the allied governments were deliberately fabricating and concocting false reports as propaganda to put Russia in the wrong with the world; that the Soviet government [25] was a better government than our government. He predicted that it was coming to Canada, and said that the legislature did not do anything for the working people, that they had to organize and do things for themselves.

Johns said that the revolution would not need to be a bloody revolution. It could be made bloodless by the education of the people, who should read the literature which was being published. He said that he himself was not afraid to fight.

He was followed by Blumenburg, who said it was a mistake to say there would not be a fight. There would be a fight. He wore a red tie to which he drew attention, saying he was a "Red" and proud of it. He talked about a Red Revolution and having to make sacrifices to attain the end.

All of the speeches were greatly applauded.

Socialist Bulletin No. 1 was distributed at this meeting. It is Ex. No. 4.

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On Sunday, January 26, 1919, riots broke out in Winnipeg, returned soldiers taking part in considerable numbers. This was due to these Walker Theater and Majestic Theater meetings and to the fact that it had been decided at the Majestic Theater meeting to commemorate on that date the death of Rose Luxemburg and Karl Leibknecht. During the week the place of the meeting had been fixed as the Market Square. Returned soldiers assembled and broke up the meeting, and then proceeded in a mob to the headquarters of the Socialist Party, which they raided, destroying all the furniture and literature found in the premises; a large red flag was thrown out and publicly burned. The mob then attacked various places occupied by Austrians and destroyed the German Club.

On Monday, January 27, rioting broke out again, and Blumenburg's store was ransacked and wrecked, foreigners were beaten and made to kiss the British flag.

The Calgary Convention.

This convention, which had been planned at the Quebec Convention, was called accordingly and met at Calgary on March 13, 14, and 15, 1919.

Russell was provincial secretary for Manitoba of the Socialist Party of Canada. He was also a delegate from the Winnipeg [26] Trades and Labor Council to the Calgary Convention, and attended as such.

Joseph Knight, of Edmonton, attended this convention. A few weeks previously he made a speech at a miners' convention which was also held at Calgary, in which he referred to the efforts being made to spread the propaganda of the Socialist and Labor movements, which could not be separated. He referred to Lenin and his works, and stated that "in the interpretation of 'political action' men have come to the position, in the end, of direct political action, which I may say is not in the method of the ballot box."

The accused Russell, Armstrong, Johns, and Pritchard were all in attendance at the Calgary Convention.

A report of a committee on resolutions was presented and the

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following resolution was adopted unanimously on motion of Delegate Kavanagh, seconded by Delegate Pritchard:—

“Whereas great and far-reaching changes have taken place during the last year in the realms of industry;

“And whereas we have discovered through painful experiences the utter futility of separate action on the part of the workers organized merely along craft lines, such action tending to strengthen the relative position of the master class;

“Therefore be it resolved that this Western Labor Conference place itself on record as favoring the immediate reorganization of the workers along industrial lines, so that by virtue of their industrial strength the workers may be the better prepared to enforce any demand they consider essential to their maintenance and well-being.

“And be it further resolved, that in view of the foregoing we place ourselves also on record as being opposed to the innocuity of labor leaders lobbying Parliament for palliatives which do not palliate.”

Kavanagh made a speech in which he said that political action could not be defined; it meant “any action used to control political power in order to use it for the benefit of class. That is political action, and it matters not what form it takes. We have come to understand that this parliamentary system is generally all choked with bureaucratic officials that it is impossible even with a majority in the House to get what you desire put into operation.” He said that labor representatives in the Cabinet were “tools to deceive the worker.”

The convention then proceeded to deal with the report of the policy committee upon the organization and constitution of the One Big Union.

One Big Union.

[27] The principle of the One Big Union was adopted at the Calgary Convention. A ballot was directed to be taken on the question of a strike for a six-hour day, of severing connection with existing labor organizations, and of forming One Big Union. This ballot was taken by the “Locals” about the end of March.

The constitution of the One Big Union was adopted at a meet-

ing held at Calgary about June 4. This was after the commencement of the Winnipeg strike.

That strike had been precipitated by a strike of the metal workers, in sympathy with which other local organizations were called out by the Winnipeg Trades and Labor Council.

The General Strike in Winnipeg.

A ballot for a general strike was taken within the week preceding May 15, 1919.

At 11 o'clock on May 15 the strike became effective.

Russell was business agent of the Machinists' Union and of the Metal Trades Council. He was on the central strike committee, which at first consisted of five persons known as the "Big Five" and was composed of Russell, Winning, Veitch, McBride, and Robinson.

A meeting of the general strike committee was held on May 14, at the Labor Temple in Winnipeg. Russell, Armstrong, Ivens, Queen, Heaps, were all present. They are all named in the indictment.

The general strike committee consisted of about 300 persons.

The police were instructed not to strike at that time, although they had voted to do so and had given a strike notice to the police commissioners, as it was anticipated that if they did so martial law would be proclaimed, which was not desired by the committee.

Waterworks employees were instructed to remain on the job but to reduce the water pressure to 30 pounds, so that water would not rise higher than the first floors. After a lapse of time and as soon as the city council ordered the pressure back to normal, they were called out.

Every organization affiliated with the Trades and Labor Council was ordered out, and every effort was made to force unorganized workers to stop work as well.

During the first week or so of the strike, the executive work was done by the "Big Five."

[28] When the strike became effective it is said there were 24,000 persons who left their employment, which included all the organized workers except the Typographical Union.

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Among those who came out were the employees of the railways, street railways, telephone system, postoffice, express companies, milk and bread companies, the fire department, city health and scavenging departments, and hotels and restaurants.

As the police had representatives on the strike committee the force was dismissed as a whole by the Winnipeg Police Commission after refusal to sever connection with the Trades and Labor Council.

Pickets were placed on the postoffices and throughout the city.

Publication of newspapers was eventually stopped by a strike of the pressmen operating the heavy presses.

Ivens and Queen, with others, were appointed to print and circulate a "Strike Bulletin," which was done. Armstrong was one of the "censor" committee. Sixteen to eighteen thousand copies were issued daily, copies being sent to all parts of Canada.

A committee of strikers was formed to supply food to returned soldiers and strikers. This proved impracticable, and milk and bread drivers were ordered back to their jobs.

Permission was given to flour mills for the grinding of a limited amount of wheat; the limit having been exceeded, the mill workers were called out again.

Permits were issued by the strike committee for the carrying on of certain kinds of business, for the sending of censored telegrams, for the purchase of gasoline, etc.

Moving picture theaters were issued permit cards on condition that they posted a permit card "Permitted by authority of the strike committee" outside the theater and showed on the screen: "The operators in this theater are working in harmony with the strike committee."

A permit was granted for the furnishing of certain supplies to the hospitals. Delivery wagons were not permitted to operate without a similar permit card prominently displayed.

Efforts were made to promote sympathetic strikes in other cities and were successful in the cities of Edmonton, Calgary, Regina, Brandon, and many points in western Canada as far as Vancouver.

On June 4, drivers of milk and bread wagons were again called out.

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[29] Several of the accused, from time to time, addressed open-air meetings in support of the strike.

The citizens who were opposed to the sympathetic strike took steps to patrol the streets, to guard the fire alarm boxes, to man the fire halls, to supply workers in the waterworks department, to form volunteer military organizations, and to distribute food.

About May 23, a meeting took place at the City Hall between representatives of the strikers and the mayor and representatives of the city council. Russell, Queen, and Ivens were present. Russell and Queen spoke. When the mayor stated that he represented constituted authority in the city, Queen rose and said he did not want to hear anything about constituted authority, they were running the city and would continue to run the city, and would show the citizens who were running the city. He then told the mayor to sit down.

In June demonstrations and processions were frequent in the streets. A great deal of intimidation was evident.

The mayor describes a mob of about 4,000 aliens and 500 returned soldiers which assembled in the streets on June 10. The special police of the city were driven from the streets. There was serious rioting at this time.

On June 21 about 1,400 special civil police were available and the mayor issued a proclamation urging the citizens to keep off the streets. Prior to this there had been a direct prohibition of street parades. An attempt was made to run a few street cars on this date. The strike sympathizers demanded the right to parade and that the running of street cars be discontinued. Large crowds assembled in the streets. The special police were unable to cope with them. The mayor then called on the Royal Northwest Mounted Police for assistance; on arrival they were attacked by the crowd and shots were fired from the roofs of houses. The Riot Act was read by the mayor. The military were then called out. The mounted police fired volleys. One person was killed and a considerable number were wounded, one of whom subsequently died.

The strike lasted for six weeks. During the whole of that time there existed a widespread system of terrorism. It was due to the energetic action of the general body of the citizens that the
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necessaries of life were procured and distributed and property protected.

[30] On June 17 the accused were arrested and subsequently admitted to bail.

On June 26 the strike collapsed and was called off by the strike committee.

Literature.

It was announced at the Majestic Theater meeting that literature was being generally disseminated through the country so that when the time came the people would know how to conduct themselves.

In the autumn of 1918, the Trades and Labor Council being dissatisfied with the editorial management of its official newspaper "The Voice," took control of the paper, changed its name to "The Western Labor News" and appointed Ivens, one of the accused named in the indictment, as editor, and Queen, also accused, as business manager. Russell was on the press committee of the paper. It made repeated and violent attacks on capitalism and the "exploiting class." On April 25, 1919, an article appeared all of which is in the same vein and of which the following is a sample:—

"There is no hope for the worker in the arena of politics. The ruling class has corraled all the political machinery that there is for democratic government. As they have treated the worker in the past they will treat him in the future. The worker is the beast who has to be kept under and if he cannot be kept under by specious reasoning or by doles and soup kitchens, he will be handled by bayonets and machine guns. Only by the One Big Union can labor ever realize its solidarity and bring pressure to bear upon the exploiting class that will result in justice and a square deal for the workers."

In the issue appears a plan of "the Russian Soviet System," which the workers were urged to cut out and keep.

The witness, Zaneth, was employed by the Socialist Party of Canada to distribute among western miners the Revolutionary Age, The Red Flag, The Soviet, The Soviet at Work, Bolshevik and Soviet, Political Parties in Russia by Nicholas Lenin, Com-
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munist Manifesto of Canada, O.B.U. Bulletins, and other similar literature.

Witness states he was told to give these publications away if necessary to get rid of them. Some of them had been prohibited by order-in-council.

Knight, Pritchard, Armstrong, O'Sullivan, Johns, Russell, and others were members of the Socialist Party of Canada and were responsible for this propaganda.

\ [31] The Socialist Bulletin was printed and widely distributed in Winnipeg. The Red Flag was published at Vancouver, the Soviet at Edmonton. They all contained articles of the same type.

Russell does not hesitate to associate himself with the following extract from The Manifesto of the Socialistic Party of Canada:—

“The politics of the working class are comprised within the confines of the class struggle. And conversely, the class struggle is necessarily waged on the political field.

“By this statement we do not imply that the political action of the working class must be limited within the bounds of constitutional convention or of parliamentary procedure, nor that the means employed in waging the class struggle must everywhere be the same. Political action we define as any action taken by the slave class against the master class to obtain control of the powers of state, or by the master class to retain control, using these powers to secure them in the means of life. For one country it may be the ballot, in another the mass strike, in a third insurrection.

“These matters will be determined and dictated by the exigencies of time and place.”

He also stated that the Communist Manifesto, Ex. 37, was certainly part of the propaganda which it was his duty to spread. It contains the following:—

“The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communistic revolution. The proletariat
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ans have nothing to lose but their chains. They have a world to win."

From the Socialist Bulletin circulated in Winnipeg in March, 1919, is taken the following:—

"But if you are desirous of stopping the robbery, there is only one remedy, that is the overthrow of the capitalistic system upon which the robbery of the worker is based. This can only be done by the working class organizing themselves on the plane of power. They have done it in Russia, placing the working class in the position of the ruling class. That is what the Socialist Party of Canada stands for. Get busy and line up with this working class organization whose sole object is the overthrow of the present system of robbery, by placing the workers in control of wealth which they alone create, thus enabling them to individually enjoy what they socially produce."

The O.B.U. bulletin of May 1, 1919, Ex. 83, published in Winnipeg by the Manitoba committee, of which the accused Russell was secretary, contains a number of articles intended to stir up feelings of antagonism and hatred between classes in the community, and the same may be said of most of the literature read at the trial of this case.

Dealing with the question of strikes, it says:—

"If we go on strike we must strike quickly, sudden and certainly. Don't give the boss time to think or prepare plans. He might get the better of us, [32] and that would be bad for us and immoral. Strike when he has a big order which he must fulfil. It will hurt him more and us less, and that is moral. Tie up the industries in town, all the industries in all the towns, in the whole country, or in the whole world if necessary. The strike will end quicker and we will starve less and that's good for us and therefore moral.

". . . Don't strike for more than you have a right to demand. You have a right to demand all you have power to enforce."

It also contains the following:—

"What would happen if labor withheld its power to produce? Capitalists, priests, politicians, press hirelings, thugs, sluggers, hangmen, policemen, and all creeping and crawling things that
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suck the blood of the common workingman, would die of starvation. Like Samson in the temple, Labor's arms may rend the pillars which support society and bring the social edifice down to destruction about its own ears."

Ex. 171, a pamphlet by Lenin in the form of question and answer, states that "all monarchs must be dethroned" and "all lands taken."

The Socialist Bulletin No. 1 of January, 1919, advertised the Walker Theater meeting, and refers to Russell as the agent for the distribution of that publication.

The Socialist Bulletin No. 6 published in May and dealing with the Russian Revolution, says: "We desire to see foreign monarchies destroyed," and, "One King is as dangerous as fifty." This number of the Bulletin was distributed on the morning of the strike.

In addition to being a delegate to the Quebec Convention, the Calgary Convention and one of the "Big Five" of the Winnipeg strike, Russell was provincial secretary of the Socialist Party of Canada, and distributed the Socialist Bulletin. He was district secretary-treasurer of the Railway Machinists' Union and publisher of the Machinists' Bulletin. He was secretary of the Manitoba Executive Committee of the O.B.U.

He states his position in connection with the dissemination of the literature quoted in the following words: "My function in the Socialist society ever since I have taken an interest in these things has been propaganda. I was doing the same with the labor organizations, the labor councils, that is what I was sent there for."

Such being a portion of the story of the widespread and connected activities of these accused persons, objections to the admission of evidence can be more confidently considered and determined by a Court of Appeal which views the whole case with its ramifications, than by a trial judge who gives his rulings from time to time as the case proceeds.

[33] Counsel for the accused took the ground that evidence of speeches made by or in the presence of the accused Russell at trade-union meetings, and evidence of acts done by strikers who
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were members of trade-unions, was inadmissible, being protected by the provisions of § 590 of the Code. With this I am unable to agree, and concur in the reasons given by Perdue, C.J.M., and my brother Cameron, which I have had the privilege of perusing. The acts which the accused intended to be done and conspired to have done were seditious, and punishable by statute, and were not within the immunity conferred by the section.

When this section is read in conjunction with § 573 of the Code, the difficulty of specifying any trade conspiracy which is not unlawful will be apparent.

The speeches quoted are evidence of a seditious intent on the part of the speakers, and when read together are evidence of agreement to aid and abet the commission of seditious acts which is the gist of conspiracy.

In my opinion they were properly admitted in evidence.

Counsel for the accused objected to the admission of documents of three classes: (1) Documents found in the possession of the accused. (2) Documents found in the possession of persons not named in the indictment. (3) Documents passing between parties other than those named in the indictment.

These documents were of two mixed classes,—one of which dealt with labor problems, the other with advanced radical ideas of the type referred to at the trial as “left” or “red flag” socialism of a revolutionary character.

As for the documents found in the possession of Russell, there can be no doubt they were properly admitted, as they were in existence at the time he was taken into custody. They go to prove either conspiracy or intention. *Horne Tooke Case* (1794) 25 How. St. Tr. 1; *Hardy's Case* (1794) 24 How. St. Tr. 199. Possession of letters implies knowledge of their contents. *Wright v. Doe* (1837) 7 Ad. & El. 313, 369, 396, 112 Eng. Reprint, 488, 2 Nev. & P. 303, 7 L. J. Exch. N. S. 340; Taylor on Evidence, § 595; *Reg. v. O'Donnell* (1848) 7 St. Tr. (N.S.) 637, 652, 762.

The Socialist Party of Canada and the Trades and Labor Council of Winnipeg were working together for a common object. They held a joint meeting in the Walker Theater on December 22, 1919, at which the speeches above quoted were made, and at
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[34] which literature common to both organizations was distributed. They openly advocated a common purpose. Russell was a principal official of both organizations and one of the speakers at the meeting. He states that his constant aim and employment was to spread the propaganda of both organizations. Johns and Armstrong, named in the indictment, were members of both organizations and associated with the spread of their propaganda. Pritchard was a member of the Socialist Party of Canada, and, along with Johns, Knight, Midgley, and Naylor, was on the central committee appointed at the Calgary Conference.

The Crown having established by strong and voluminous evidence that there was a conspiracy on foot with intent to carry into effect the numerous and serious overt acts set forth in the indictment, I am of opinion that the Socialistic and Labor publications admitted as evidence of intent were properly admitted when shown, as they were, to be the authorized productions of the associations of which these men were prominent officials. It did not matter in whose possession they were found. Russell was familiar with them all and admitted it.

In any event the admission of copies of The Communist Manifesto found in the possession of Rose Henderson of Montreal, of Phillippi of Montreal, and of Stevenson of Vancouver, worked no harm to the accused Russell, for he frankly associated himself with the doctrines which it contained. Rose Henderson was in correspondence with Russell and sent him a diagram of the Soviet government, which was published in the Western Labor News. Stevenson was the secretary of the Dominion Executive of the Socialist Party of Canada. Russell on Crimes, 146, 191; *Reg. v. Parnell* (1881) 14 Cox, C. C. 508, at 515; *Reg. v. Murphy* (1837), 8 Car. & P. 297; Wright on Conspiracy, 213, 216; *Reg. v. Kelly* (1916) 27 Can. Crim. Cas. 140, 27 Manitoba L. R. 105, affirmed in (1916) 54 Can. S. C. 220, 27 Can. Crim. Cas. 282, 34 D. L. R. 311; *Reg. v. Connolly* (1894) 25 Ont. Rep. 151; *Rex v. Hutchinson* (1904) 11 B. C. 24, 32; *Rex v. Hardy* (1794) 24 How. St. Tr. 199, 210.

With regard to the last point,—letters passing between parties not named in the indictment such as those between Beatty and Stevenson, Cassidy and Stevenson, Simpson and Bennett, Rob-

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erts and Stevenson, Donaldson and Bennett,—these were letters referring to the propaganda which Russell was circulating and asking [35] for more of it. The jury was warned by the trial judge in respect to them as follows:—

“If the jury is convinced that any one of these persons was not a co-conspirator, then his acts and statements should not be considered by the jury as evidence against Russell, of seditious intention or of conspiracy, and should be disregarded entirely. As to such letters as those of Beatty and as to the statements made by others whom I have not named—there are so many I will just put it that way—as to their acts and statements, I would advise you to disregard them, except as to the class of propaganda which is thereby indicated, the extent of such, and the intent thereby disclosed, and those responsible for such propaganda in so far as you may find them connected with the accused Russell.”

These letters making as they do frequent reference to “revolt” and the “revolution,” to the “Red Flag,” “The Soviet” and “The Bolshevik,” are clearly connected with the propaganda which Russell was distributing, and were, in my opinion, properly admitted to show the geographical extent to which that propaganda had reached, and to show that these parties were working with Russell to carry out the same purposes. They had a direct bearing on the charges against the accused, their admission subject to the warning of the trial judge was proper.

In conclusion, I am of opinion that no evidence was admitted which had a prejudicial effect on the fair trial of the accused and upon the whole of the reserved case that the answers to all questions should be in favor of the Crown. I concur in the reasons for judgment of **Perdue**, C.J.M., and my brother **Cameron**, which I have had the privilege of perusing.

Judgment accordingly.

Note.—Strike as seditious conspiracy.

The reported case (*THE KING v. RUSSELL*, ante, 836) is of interest as a chronicle of what is apparently the first instance on this side of the Atlantic of a general strike being undertaken with a political end in view. What its avowed object was does not appear from the report, which leaves it in doubt as to whether it was a concerted
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attempt on the part of the combined trade-unions to obtain higher wages, or whether it was of a sympathetic character.

It is established law that a strike becomes an unlawful conspiracy where either the means used or the end aimed at is unlawful. See *Farrer v. Close* [1869] L. R. 4 Q. B. 602, 38 L. J. Mag. Cas. N.S. 132, 20 L. T. N. S. 802, 17 Week. Rep. 1129; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* (1893) 19 L.R.A. 395, 5 Inters. Com. Rep. 545, 54 Fed. 746; *Carter v. Fortney* (1909) 170 Fed. 463; *State v. Stockford* (1904) 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; *Reynolds v. Davis* (1908) 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457; *Longshore Printing Co. v. Howell* (1894) 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547.

In order to be lawful, a strike must have as its immediate object the advancement of the interests of the workmen concerned. "To make a strike a legal strike, it is necessary that the strikers should have acted in good faith in striking for a purpose which the court holds to have been a legal purpose for a strike, but it is not necessary that they should have been in the right in instituting a strike for such purpose. On the other hand, a strike is not a strike for a legal purpose because the strikers struck in good faith for a purpose they thought was a sufficient justification for a strike." *DeMinico v. Craig* (1911) 207 Mass. 593, 42 L.R.A.(N.S.) 1048, 94 N. E. 317.

The following have been held to be legitimate subjects of industrial disputes:—

—the advancement or maintenance of wages, *Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 Pac. 324; *Jetton-Dekle Lumber Co. v. Mather* (1907) 53 Fla. 969, 43 So. 590; *Kemp v. Division No. 241* (1912) 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347 (per Cooke, J.) s. c. in court below (1910) 153 Ill. App. 344; *L. D. Willcutt & Sons Co. v. Driscoll* (1908) 200 Mass. 110, 23 L.R.A.(N.S.) 1236, 95 N. E. 897; *M. Steinert & Sons Co. v. Tegen* (1907) 207 Mass. 394, 32 L.R.A.(N.S.) 1013, 93 N. E. 584; *Carter v. Oster* (1908) 134 Mo. App. 146, 112 S. W. 995; *New York Central Iron Works v. Brennan* (1907) 105 N. Y. Supp. 865; *Albro J. Newton Co. v. Erickson* (1911) 70 Misc. 291, 126 N. Y. Supp. 949, aff'd without opinion in 144 App. Div. 939, 129 N. Y. Supp. 1117; *Grassi Contracting Co. v. Bennett* (1916) 174 App. Div. 244, 160 N. Y. Supp. 279; *P. Reardon v. Caton* (1919) 189 App. Div. 501, 178 N. Y. Supp. 713; *Cook v. Dolan* (1897) 19 Pa. Co. Ct. 401; *Hopkins v. Orley Stave Co.* (1897) 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; *American Steel Foundries v. Tri-City Central Trades Council* (U. S. Adv. Ops. 1921-22, p. 103), — U. S. —, 66 L. ed. —, — A.L.R. —, 42 Sup. Ct. Rep. 72;—so long as the wage sought is a reasonable one, see *Sayre v. Louisville Union Benev. Asso.* (1863) 1 Duv. (Ky.) 146, 85 Am. Dec. 613;
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—shorter periods of labor, *Pierce v. Stablemen's Union, supra*; *Kemp v. Division No. 241* (1912) 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347 (per Cooke, J.); *M. Steinert & Sons Co. v. Tagen* (1911) 207 Mass. 394, 32 L.R.A.(N.S.) 1013, 93 N. E. 584; *Carter v. Oster* (1908) 134 Mo. App. 146, 112 S. W. 995; *Albro J. Newlon Co. v. Erickson* (1911) 70 Misc. 291, 126 N. Y. Supp. 949, aff'd without opinion in (1911) 144 App. Div. 939, 129 N. Y. Supp. 1111;

—the betterment of working conditions, *Pierce v. Stablemen's Union, supra*; *Kemp v. Division No. 241* (1910) 153 Ill. App. 344, reversed on other grounds in (1912) 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347; *Sheehan v. Levy* (1922) — Tex. —, 238 S. W. 900; *Hopkins v. Oxley Slave Co.* (1897) 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912;

—the payment of wages during working hours, *L. D. Willcutt & Sons Co. v. Driscoll* (1908) 200 Mass. 110, 23 L.R.A.(N.S.) 1236, 85 N. E. 897;

—an increase in the amount of work required, *Searle Mfg. Co. v. Terry* (1905) 56 Misc. 265, 106 N. Y. Supp. 438;

—the recognition in a shop of a system of piecework which allows workers to employ helpers, the effect of which is, in times of slack work, to deprive those not employing helpers of continuous work, *Minasian v. Osborne* (1911) 210 Mass. 250, 37 L.R.A.(N.S.) 179, 96 N. E. 1036, Ann. Cas. 1912C, 1299; but see *W. P. Davis Mach. Co. v. Robinson* (1903) 41 Misc. 329, 84 N. Y. Supp. 837, *infra*;

—the giving to, or obtaining for, the employees, of work which otherwise would be done by others, *National Fireproofing Co. v. Mason Builders' Asso.* (1909) 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; *Pickett v. Walsh* (1906) 192 Mass. 583, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *Burnham v. Dowd* (1914) 217 Mass. 351, 51 L.R.A.(N.S.) 778, 104 N. E. 841; *New England Cement Gun Co. v. McGivern* (1914) 218 Mass. 198, L.R.A.1916C, 986, 105 N. E. 885 (*obiter*);

—the limitation of the number of apprentices, *Longshore Printing Co. v. Howell* (1894) 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547;

—the violation of an employer of his agreement with the union relating to terms and conditions of employment, *Greenfield v. Central Labor Council* (1920) — Or. —, 192 Pac. 783, modified, on other grounds on rehearing in (1922) — Or. —, 207 Pac. 168.

A strike has been held justifiable where occasioned by the employer's intentional failure, without apparent excuse and without notice, to keep an engagement with representatives of his employees for further consultation touching their contractual relations with one another.

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other, in *Walton Lunch Co. v. Kearney* (1920) 236 Mass. 310, 128 N. E. 429.

The members of a labor union may, so long as they act in good faith, lawfully give their employer the alternative of dispensing with their services or with the services of others (see *Clemmitt v. Watson* (1895) 14 Ind. App. 38, 42 N. E. 367; *Carter v. Oster* (1908) 134 Mo. App. 146, 112 S. W. 995; *Mayer v. Journeymen Stonecutters' Asso.* (1890) 47 N. J. Eq. 519, 20 Atl. 492; *Reform Club v. Laborers' Union Protective Soc.* (1899) 29 Misc. 247, 60 N. Y. Supp. 388; *Walsby v. Anley* (1861) 3 El. & El. 516, 121 Eng. Reprint, 536, 7 Jur. N. S. 465, 30 L. J. Mag. Cas. N. S. 121, 3 L. T. N. S. 666, 9 Week. Rep. 271; *Giblan v. National Amalgamated Laborers' Union* [1903] 2 K. B. (Eng.) 600, 1 B. R. C. 528, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708), provided that such others are persons whom the employer is not bound to retain for a definite period (see *Read v. Friendly Soc.* [1902] 2 K. B. (Eng.) 732, 1 B. R. C. 503, 71 L. J. K. B. N. S. 994, 51 Week. Rep. 115, 87 L. T. N. S. 493, 19 Times L. R. 20, 66 J. P. 822); although where the primary purpose is to injure an obnoxious coemployee, it does not constitute an exercise of the right to choose one's associates, and so is not justifiable; it has accordingly been held that one's habits or conduct or character may constitute a justification for a combination of his fellow workmen to refuse to work with him (see *Berry v. Donovan* (1905) 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; *Heywood v. Tillson* (1883) 75 Me. 225, 46 Am. Rep. 373, *arguendo*), but that mere personal dislike, not founded on a definite cause, is not (see *De Minico v. Craig* (1911) 207 Mass. 593, 42 L.R.A.(N.S.) 1048, 94 N. E. 317; *People ex rel. Gill v. Smith* (1887) 5 N. Y. Crim. Rep. 509, 10 N. Y. S. R. 730, which is affirmed in (1888) 6 N. Y. Crim. Rep. 292, 15 N. Y. S. R. 17, which is affirmed without opinion in (1888) 110 N. Y. 633, 17 N. E. 871).

The great weight of authority is to the effect that a strike for the purpose of coercing the employer to dispense with the services of coemployees, for the purpose of forcing them to join the union, is not justifiable. See *Plant v. Woods* (1900) 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Hanson v. Innis* (1912) 211 Mass. 301, 97 N. E. 756; *Swaine v. Blackmore* (1898) 75 Mo. App. 74; *Carter v. Oster* (1908) 134 Mo. App. 146, 112 S. W. 995; *Ruddy v. United Asso.* (1910) 79 N. J. L. 467, 75 Atl. 742, *aff'd* without opinion in (1911) 81 N. J. L. 574, 79 Atl. 1119; *Schwarz v. International Ladies' Garment Workers' Union* (1910) 68 Misc. 528, 124 N. Y. Supp. 968; *Grassi Contracting Co. v. Bennett* (1916) 174 App. Div. 244, 160 N. Y. Supp. 279; *Erdman v. Mitchell* (1903) 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327 10 B. R. C.

Contra: Wunch v. Shankland (1901) 59 App. Div. 482, 69 N. Y. Supp. 349, appeal dismissed for want of jurisdiction in (1902) 170 N. Y. 573, 62 N. E. 1102. And see also *Kemp v. Division No. 241* (1912) 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347, in which the division of opinion is such as to render the position of the court on the question doubtful.

The courts have differed as to whether the "closed shop" is a legitimate subject of industrial dispute. That it is not is held in *State v. Glidden* (1887) 55 Conn. 46, 33 Am. St. Rep. 23, 8 Atl. 890; *O'Brien v. People* (1905) 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 Ann. Cas. 966; *Folsom v. Lewis* (1911) 208 Mass. 336, 35 L.R.A.(N.S.) 787, 94 N. E. 316; *W. A. Snow Iron Works v. Chadwick* (1917) 227 Mass. 382, L.R.A.1917F, 755, 116 N. E. 801; *White Mountain Freezer Co. v. Murphy* (1917) 78 N. H. 398, 101 Atl. 357; *W. P. Davis Mach. Co. v. Robinson* (1903) 41 Misc. 329, 84 N. Y. Supp. 837; *Schwarcz v. International Ladies' Garment Workers' Union* (1910) 68 Misc. 528, 124 N. Y. Supp. 968; *Grand Shoe Co. v. Children's Shoe Workers' Union* (1920) 187 N. Y. Supp. 886; *Pre' Catelan v. International Federation of Workers* (1921) 114 Misc. 662, 188 N. Y. Supp. 29; *Lehigh Structural Steel Co. v. Atlantic Smelting & Ref. Works* (1920) 92 N. J. Eq. 131, 111 Atl. 376; *Webb v. Cooks, Waiters' & Waitresses' Union* (1918) — Tex. Civ. App. —, 205 S. W. 465; *Cooks, Waiters, & Waitresses' Local Union v. Papageorge* (1921) — Tex. Civ. App. —, 230 S. W. 1086;—at least, where the object is not to secure a direct benefit for the employees, but to enable the union to obtain a monopoly of the labor market. *Contra: State v. Stockford* (1904) 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; *Mayer v. Journeymen Stonecutters' Asso.* (1890) 47 N. J. Eq. 519, 20 Atl. 492; *Jersey City Printing Co. v. Cassidy* (1902) 63 N. J. Eq. 759, 53 Atl. 230; *Albro J. Newton Co. v. Erickson* (1911) 70 Misc. 291, 126 N. Y. Supp. 949, affirmed in (1911) 144 App. Div. 939, 129 N. Y. Supp. 1111:

And the following have been held not to be legitimate subjects of industrial dispute:—

—recognition of the union, see *Re Higgins* (1886) 27 Fed. 443; *Tunstall v. Stearns Coal Co.* (1911) 41 L.R.A.(N.S.) 453, 113 C. C. A. 132, 192 Fed. 808; *Wabash R. Co. v. Hannahan* (1903) 121 Fed. 563; *Reynolds v. Davis* (1908) 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457; *Heitkemper v. Central Labor Council* (1920) 99 Or. 1, 192 Pac. 765; but see, *contra, Michels v. Hillman* (1920) 112 Misc. 395, 183 N. Y. Supp. 195;

—the maintenance in the employer's business of a "shop representative," to see that union rules are enforced and that no one is discharged except for reasonable cause, of which the union is to be the

sole judge, *Pre' Catelan v. International Federation of Workers* (1921) 114 Misc. 662, 188 N. Y. Supp. 29;

—the use of machinery which will diminish the amount of hand labor required, *Hopkins v. Orley Stave Co.* (1897) 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912;

—the refusal of the employer to become a member of an employers' association favored by the union, *Coons v. Chrystie* (1898) 24 Misc. 296, 53 N. Y. Supp. 668; *Parker Paint & Wall Paper Co. v. Local Union* (1921) 87 W. Va. 631, 16 A.L.R. 222, 105 S. E. 911 (but compare *Sheehan v. Levy* (1922) — Tex. —, 238 S. W. 900, where the object of the union was to obtain for its members in the service of the employer the benefits enjoyed under a working agreement which it had with the association. The court said, however, that if the union could have gotten exactly the same contract with the employer that the association offered them, they would not have had the right to cease working for him just because he would not join the association);

—the payment by the employer of a fine imposed upon him by the union, *Burke v. Fay* (1908) 128 Mo. App. 690, 107 S. W. 408;

—the refusal of the employer to comply with a rule of the union as to the minimum number of employees, *Haverhill Strand Theatre v. Gillen* (1918) 229 Mass. 413, L.R.A.1918C, 813, 118 N. E. 671, Ann. Cas. 1918D, 650. *Contra*; *Scott-Stafford Opera House Co. v. Minneapolis Musicians' Asso.* (1912) 118 Minn. 410, 136 N. W. 1092;

—the refusal of the employer to employ foremen to be selected by the union, *Grassi Contracting Co. v. Bennett* (1916) 174 App. Div. 244, 160 N. Y. Supp. 279;

—the employer's desire to work as an operative in his own business *Rornback v. Motion Picture Mach. Operators' Union* (1918) 140 Minn. 481, 3 A.L.R. 1290, 168 N. W. 766, 169 N. W. 529; *Campbell v. Motion Picture Mach. Operators' Union* (1922) — Minn. —, — A.L.R. —, 186 N. W. 781; *Hughes v. Kansas City Motion Picture Mach. Operators* (1920) 282 Mo. 304, 221 S. W. 95; *Parker Paint & Wall Paper Co. v. Local Union* (1921) 87 W. Va. 631, 16 A.L.R. 222, 105 S. E. 911;

—the refusal of the employer to reinstate a discharged employee, *Mechanic's Foundry & Mach. Co. v. Lynch* (1920) 236 Mass. 504, 12 A.L.R. 1057, 128 N. E. 877; *Com. v. Curren* (1869) 3 Pittsb. 143; *Re Higgins* (1886) 27 Fed. 443; *Contra*: *Walter A. Wood Mowing & Reaping Mach. Co. v. Toohey* (1921) 114 Misc. 185, 186 N. Y. Supp. 95; *National Protective Asso. v. Cumming* (1902) 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369 (*obiter*); *Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 Pac. 324 (*obiter*).

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—the refusal of the employer to eliminate from his agreement with his employees the stipulation that during their employment they will not join any union, *Floersheimer v. Schlesinger* (1921) 115 Misc. 9, 187 N. Y. Supp. 891; *McMichael v. Atlanta Envelope Co.* (1921) 151 Ga. 776, — A.L.R. —, 108 S. E. 226;

—the refusal of the employer to abandon the practice of making individual contracts running for one year, with each employee, *United Shoe Machinery Corp. v. Fitzgerald* (1921) 237 Mass. 537, — A.L.R. —, 130 N. E. 86;

—the continuance by the employer of a department of his business which he wished to discontinue, *Welinsky v. Hillman* (1920) 185 N. Y. Supp. 257;

—the distribution, in slack seasons, of all available work among all workers, *Benito Rovira Co. v. Yampolsky* (1921) 187 N. Y. Supp. 894; *Jaeckel v. Kaufman* (1920) 187 N. Y. Supp. 889.

The negotiation of a contract conferring on members of the union the right of preferential employment with a minimum wage scale, and stipulating that permanent employees shall not be temporarily laid off, even if there should not be enough work to keep them employed, and that disputes not covered by the agreement must be submitted to arbitration, is not a legitimate object of industrial dispute. *Folsom Engraving Co. v. McNeil* (1920) 235 Mass. 269, 126 N. E. 479.

A sympathetic strike, in which the striking employees have no demands or grievances of their own, but strike for the purpose of indirectly aiding others, having no direct relation to the advancement of the interest of the strikers, is, according to the great weight of authority, an unjustifiable invasion of the rights of the employer. See *The Old Dominion Steamship Co. v. McKenna* (1887) 30 Fed. 48; *Irving v. Joint Dist. Council, U. B. C. J.* (1910) 180 Fed. 896; *Pickett v. Walsh* (1906) 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *Lyons v. Wilkins* [1896] 1 Ch. 811, 65 L. J. Ch. N. S. 601, 74 L. T. N. S. 358, 45 Week. Rep. 19, 60 J. P. 325.

But in *Krug Furniture Co. v. Berlin Union* (1903) 5 Ont. L. Rep. 463 (a decision by a court of first instance) it was held that workmen satisfied with their business relationship with their employer and in no way directly concerned in the differences between their employer and other workmen may strike out of sympathy so long as they break no contract. The defendants were, however, held liable on the ground that the strike had been prosecuted by unlawful means.

And in *Lehigh Structural Steel Co. v. Atlantic Smelting & Ref. Works* (1920) 92 N. J. Eq. 131, 111 Atl. 376, it was said: "The
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men were not under contract, and individually had the right to quit work as it pleased them, and as members of the federation it was their privilege to use the strike in sympathy with the endeavors of their New York brethren, and to advance the common case of organized labor, provided the motive—that is, the object sought to be attained—was not an unlawful one.” The object of the strike, however, was held by the court to be unlawful. E. S. O.

[PRIVY COUNCIL.]

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED, *Appellants*,
and
LOACH, *Respondent*.

[1916] A. C. 719.

Also Reported in 85 L. J. P. C. N. S. 23, 113 L. T. N. S. 946.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Street railways — Negligence — Defective brakes — Proximate cause of injury to one guilty of contributory negligence.

The principle that contributory negligence will not prevent a recovery if the defendant, by the exercise of care, could have prevented the injury, is applicable where a street railway, although it commits no negligent act after one guilty of contributory negligence gets on the track, was negligent in allowing the operation of a car having defective brakes, because of which the injury could not be avoided.

(July 26, 1915.)

Present: Viscount Haldane, Lord Parker of Waddington, and Lord Sumner.

APPEAL from a judgment of the Court of Appeal of British Columbia (January 6, 1914) reversing the judgment of the judge at the trial with a jury.

The respondent, as administrator of the estate of Benjamin Sands, deceased, brought an action against the appellants under the Families Compensation Act (R. S. B. C. 1911, chap. 82) to recover damages in respect of the death of the deceased, which he alleged to have been caused by the negligence of the appellants.
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The above-mentioned act is in substantially the same terms as the Fatal Accidents Act 1846 (9 & 10 Vict. chap. 93 [Imp.]). The appellants denied the alleged negligence, and pleaded, *inter alia*, that the death of Sands was caused by his contributory negligence.

The accident which gave rise to the action occurred while the deceased was being driven by another man in a wagon called a "rig." The highway along which the wagon was proceeding crossed the appellants' track on the level at a point near a station [720] and an orchard. While the wagon was being driven across the track it was run into by an electric car belonging to the appellants, with the result that the deceased was killed.

The following were the questions left to the jury by Murphy, J., at the trial and the answers thereto:—

1. Was the defendant company guilty of negligence which was the proximate cause of the accident?—A. Yes.

2. If so, in what did such negligence consist?—A. Excessive speed under the circumstances; namely, a single track was in use for both-way passengers, and it was proved that passengers were waiting whose destination was unknown to the motorman or conductor. Therefore, the speed should have been slackened and the car brought under complete control approaching the station. Insufficient space between the orchard and station for observing approach of cars from the north.

3. Was the deceased, as distinguished from the driver of the rig, guilty of negligence which contributed to the accident?—A. Yes.

4. If so, in what did such negligence consist?—A. By not taking extraordinary precautions to see the road was clear.

5 and 6. If both the company and the deceased were guilty of negligence, could the company then have done anything which would have prevented the accident? If so, what? Answer fully.

—A. Yes, the motorman could have stopped the car if the brake had been in effective condition.

[Questions 7 to 10 were as to whether the driver of the rig, as distinguished from the deceased, had been negligent, and whether the appellants could have avoided the result of that negligence. The jury answered as in reply to questions 3 to 6.]

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11. (a) Damages for widow?—A. 5,000 dollars. (b) Damages for each child?—A. 2,500 dollars.

After argument the learned judge gave judgment for the appellants on the ground that, the jury having found that both the defendants and the deceased had been negligent, there was no evidence of any further negligence on the part of the defendants.

Upon appeal the Court of Appeal by a majority (Irving, Martin, and Galliher, J.J.A., Macdonald, C.J.A. and McPhillips, J.A., dissenting) reversed the above decision and gave judgment for the plaintiff for the amounts found by the jury.

[721] **Dickens, K.C., and T. T. Paine**, for the appellants. Upon the facts proved at the trial the appellants were entitled to judgment. There was no evidence of any negligence or want of care upon the part of the appellants subsequent to the negligence of the deceased. The jury found that there was contributory negligence on the part of the deceased; that negligence was the proximate cause of the accident. Even if the appellants' negligence is to be regarded as continuing, that of the deceased was of the same character, and, having regard to the third finding, he is not entitled to recover. [*Canadian P. R. Co. v. Fréchette* [1915] A. C. 871, 84 L. J. P. C. N. S. 161, 31 Times L. R. 529; *Reynolds v. Thomas Tilling* (1903) 19 Times L. R. 539, and *Radley v. London & N. W. R. Co.* (1876) L. R. 1 App. Cas. 754, 46 L. J. Exch. N. S. 573, 35 L. T. N. S. 637, 25 Week. Rep. 147, were referred to.]

D. G. Macdonell, for the respondent, was not called upon.

The judgment of their Lordships was delivered by

Lord Sumner: This is an appeal from a judgment of the Court of Appeal of British Columbia in favor of the administrator of the estate of Benjamin Sands, who was run down at a level crossing by a car of the appellant railway company and was killed. One Hall took Sands with him in a cart, and they drove together on to the level crossing, and neither heard nor saw the approaching car till they were close to the rails and the car was nearly on them. There was plenty of light and there was no other traffic about. The verdict, though rather curiously expressed, clearly finds Sands guilty of negligence in not looking out to see

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that the road was clear. It was not suggested in argument that he was not under a duty to exercise reasonable care, or that there was not evidence for the jury that he had disregarded it. Hall, who escaped, said that they went "right on to the track," when he heard Sands, who was sitting on his left, say, "Oh," and looking up saw the car about 50 yards off. He says he could then do nothing, and with a loaded wagon and horses going 2 to 3 miles an hour he probably could not. It does not seem to have been suggested that Sands could have done any good by trying to jump off the cart and clear the rails. The car knocked cart, horses, and men over, and ran some distance beyond the crossing before it [722] could be stopped. It approached the crossing at from 35 to 45 miles an hour. The driver saw the horses as they came into view from behind a shed at the crossing of the road and the railway, when they would be 10 or 12 feet from the nearest rail, and he at once applied his brake. He was then 400 feet from the crossing. If the brake had been in good order it should have stopped the car in 300 feet. Apart from the fact that the car did not stop in time, but overran the crossing, there was evidence for the jury that the brake was defective and inefficient, and that the car had come out in the morning with the brake in that condition. The jury found that the car was approaching at an excessive speed and should have been brought under complete control, and although they gave as their reason for saying so the presence of possible passengers at the station by the crossing, and not the possibility of vehicles being on the road, there can be no mistake in the matter, and their finding stands. It cannot be restricted, as the trial judge and the appellants sought to restrict it, to a finding that the speed was excessive for an ill-braked car, but not for a properly braked car, or to a finding that there was no negligence except the "original" negligence of sending the car out ill equipped in the morning.

Clearly if the deceased had not got on to the line he would have suffered no harm, in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car and would have kept out of mischief. If the matter stopped there, his administrator's action must have failed, for he would certainly have been guilty of con-

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tributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered.

It was for the jury to decide which portions of the evidence were true, and, under proper direction, to draw their own inferences of fact from such evidence as they accepted. No complaint was made against the summing up, and there has been no attempt to argue before their Lordships that there was not evidence for the jury on all points. If the jury accepted the facts above stated, as certainly they well might do, there was no further negligence on the part of Sands after he looked up and saw the car, and then there [723] was nothing that he could do. There he was, in a position of extreme peril and by his own fault, but after that he was guilty of no fresh fault. The driver of the car, however, had seen the horses some perceptible time earlier, had duly applied his brakes, and if they had been effective he could, as the jury found, have pulled up in time. Indeed, he would have had 100 feet to spare. If the car was 150 feet off when Sands looked up and said, "Oh," then each had the other in view for 50 feet before the car reached the point at which it should have stopped. It was the motorman's duty, on seeing the peril of Sands, to make a reasonable use of his brakes in order to avoid injuring him, although it was by his own negligence that Sands was in danger. Apparently he did his best as things then were, but partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping, as he could otherwise have done. On these facts, which the jury were entitled to accept and appear to have accepted, only one conclusion is possible. What actually killed Sands was the negligence of the railway company, and not his own, though it was a close thing.

Some of the judges in the courts below appear to have thought that because the equipment of the car with a defective brake was the original cause of the collision, and could not have been remedied after Sands got on the line, no account should be taken of it in considering the motorman's failure to avoid the collision after he knew that Sands was in danger. "You cannot charge up
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the same negligence under different heads," said Murphy, J., at the trial; "you cannot charge it up twice." "On the question of ultimate negligence," he observed, "that negligence must arise on the conditions as existing at the time of the accident. It would, of course, be absurd to say the company had any opportunity between the time that this rig appeared upon the track and the collision to remedy any defect in the brake. If there was such a defect I think it was original negligence, and not what may possibly be termed 'ultimate negligence.' "

In the Court of Appeal, Macdonald, C.J.A., delivering a dissentient judgment in favor of the present appellants, said: "Where one party negligently approaches a point of danger, and the other party, with like obligation to take care, negligently approaches the same [724] point of danger, if there arises a situation which could be saved by one and not by the other, and the former then negligently fail to use the means in his power to save it, and injury is caused to the latter, that failure is designated ultimate negligence, in the sense of being the proximate cause of the injury. In this case it is sought to carry forward, as it were, an anterior negligent omission of the defendants, though continuing, it is true, up to the time of the occurrence, and to assign to it the whole blame for the occurrence, although by no effort of the defendants or their servants could the situation at that stage have been saved."

So, too, McPhillips, J.A., also dissenting, said: "Upon the evidence, whether it was because of defective brakes or any of the acts of negligence found against the defendants, none of them were acts of negligence arising after the act of contributory negligence of the deceased, and cannot be held to be acts of negligence which, notwithstanding the later negligence of the deceased, warrant judgment going for the plaintiff. . . . The motorman after he saw the vehicle could not have stopped the car . . . therefore, as nothing could be then done by the motorman to remedy the ineffective brake, the want of care of the deceased was the direct and effective contributory cause of the accident resulting in his death."

These considerations were again urged at their Lordships' bar under somewhat different forms. It was said (1) that the negli-
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gence relied on as an answer to contributory negligence must be a new negligence, the initial negligence which founded the cause of action being spent and disposed of by the contributory negligence. Further, it was said (2) that if the defendants' negligence continued up to the moment of the collision, so did the deceased's contributory negligence, and that this series, so to speak, of replications and rebutters finally merged in the accident without the deceased ever having been freed from the legal consequence of his own negligence having contributed to it.

The last point fails because it does not correspond with the fact. The consequences of the deceased's contributory negligence continued, it is true, but, after he had looked, there was no more negligence, for there was nothing to be done, and, as it is put in the classic judgment in *Tuff v. Warman* (1858) 5 C. B. N. S. 573, 585, 141 Eng. Reprint, 231, 27 L. J. C. P. N. S. 322, 5 Jur. N. S. 222, 6 Week. Rep. 693, 19 Eng. Rul. Cas. 194, his contributory negligence will [725] not disentitle him to recover "if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff."

As to the former point, there seems to be some ambiguity in the statement. It may be convenient to use a phraseology which has been current for some time in the Canadian courts, especially in Ontario, though it is not precise. The negligence which the plaintiff proves to launch his case is called "primary" or "original" negligence. The defendant may answer that by proving against the plaintiff "contributory negligence." If the defendant fails to avoid the consequences of that contributory negligence, and so brings about the injury, which he could and ought to have avoided, this is called "ultimate" or "resultant" negligence. The opinion has been several times expressed, in various forms, that "original" negligence and "ultimate" negligence are mutually exclusive, and that conduct which has once been relied on to prove the first cannot in any shape constitute proof of the second.

Here lies the ambiguity. If the "primary" negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt it is not the "ulti-
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mate" negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence is repeated or continued, and is the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the "ultimate" negligence which makes the defendant liable?

This matter was much discussed in *Brenner v. Toronto R. Co.* (1907) 13 Ont. L. Rep. 423, when Anglin, J., delivered a very valuable judgment in the Divisional Court. The decision of the Divisional Court was reversed on appeal in (1907) 15 Ont. L. Rep. 195; (1908) 40 Can. S. C. 540, but on other grounds, and in their comments on the decision of the Divisional Court, Duff, J., in the Supreme Court, and also Chancellor Boyd in *Rice v. Toronto R. Co.* (1910) 22 Ont. L. Rep. 446, 450, and Hunter, Ch. J., in *Snow v. Crow's Nest Pass Coal Co.* (1907) 13 B. C. 145, 155, seem to have missed the point to which Anglin, J., had specially addressed himself.

[726] The facts of that case were closely similar to those in the present appeal, and it was much relied on in argument in the court below. Anglin, J., following the decision in *Scott v. Dublin & W. R. Co.* (1861) 11 Ir. C. L. Rep. 377, 394, observed as follows (13 Ont. L. Rep. 437, 439, 440): "Again, the duty of the defendants to the plaintiff, breach of which would constitute 'ultimate' negligence, only arose when her danger was or should have been apparent. Prior to that moment there was an abstract obligation incumbent upon them to have their car equipped with efficient emergency appliances ready and in condition to meet the requirements of such an occasion. Had an occasion for the use of emergency appliances not arisen, failure to fulfil that obligation would have given rise to no cause of action. Upon the emergency arising, that abstract obligation became a concrete duty owing to the plaintiff to avoid the consequences of her negligence by the exercise of ordinary care. . . . Up to that moment there was no such breach of duty to the plaintiff. In that sense the failure of the defendants to avoid the mischief, though the result of an antecedent want of care, was negligence which occurred, in the sense of becoming operative, immediately after the duty, in the 10 B. R. C.

breach of which it consisted, arose. It effectively intervened between the negligence of the plaintiff and the happening of the casualty. But there is a class of cases where a situation of imminent peril has been created, either by the joint negligence of both plaintiff and defendant, or, it may be, by that of the plaintiff alone, in which, after the danger is or should be apparent, there is a period of time, of some perceptible duration, during which both or either may endeavor to avert the impending catastrophe. . . . If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes—a remote cause or a cause merely *sine qua non*—it is, in very truth, the efficient, the proximate, the decisive cause of the incapacity, and therefore of the mischief. . . . Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence may, in some cases, though anterior in point of time to the plaintiff's negligence, [727] constitute 'ultimate' negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. . . ."

Their Lordships are of opinion that, on the facts of the present case, the above observations apply and are correct. Were it otherwise the defendant company would be in a better position, when they had supplied a bad brake but a good motorman, than when the motorman was careless but the brake efficient. If the superintendent engineer sent out the car in the morning with a defective brake, which, on seeing Sands, the motorman strove to apply, they would not be liable, but if the motorman failed to apply the brake, which, if applied, would have averted the accident, they would be liable.

The whole law of negligence in accident cases is now very well settled, and, beyond the difficulty of explaining it to a jury in terms of the decided cases, its application is plain enough. Many persons are apt to think that, in a case of contributory negligence like the present, the injured man deserved to be hurt; but the question is not one of desert or the lack of it, but of the cause legally responsible for the injury. However, when once the steps

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are followed the jury can see what they have to do, for the good sense of the rules is apparent. The inquiry is a judicial inquiry. It does not always follow the historical method and begin at the beginning. Very often it is more convenient to begin at the end, that is, at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsibility for the wrongful act which has caused the damage. It is in search, not merely of a causal agency, but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purposes they are remote. Till that has been done there may be a considerable sequence of physical events, and even of acts of responsible human beings, between the damage done and the conduct which is tortious and is its cause. It is surprising how many epithets eminent judges have applied to the cause, which has to be ascertained for this judicial purpose of determining liability, and how many more to other acts and incidents which for this purpose are not the cause at all. "Efficient or effective cause," "real cause," "proximate cause," "direct [728] cause," "decisive cause," "immediate cause," "*causa causans*," on the one hand, as against, on the other, "*causa sine qua non*," "occasional cause," "remote cause," "contributory cause," "inducing cause," "condition," and so on. No doubt in the particular cases in which they occur they were thought to be useful or they would not have been used, but the repetition of terms without examination in other cases has often led to confusion, and it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification.

In the present case their Lordships are clearly of opinion that, under proper direction, it was for the jury to find the facts and to determine the responsibility, and that upon the answers which they returned, reasonably construed, the responsibility for the accident was upon the appellants solely, because, whether Sands got in the way of the car with or without negligence on his part, the appellants could and ought to have avoided the consequences of that negligence, and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the

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negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it. Their Lordships will accordingly humbly advise his Majesty that the appeal should be dismissed, with costs.

Solicitors for appellants: *Linklater, Addison, & Brown.*

Solicitors for respondent: *Blake & Redden.*

Note.—Defective appliance on train or car as proximate cause of accident to one whose negligence brought him on track.

On the question of duty as to equipping car or train so as to avoid or minimize injury to persons or animals on or near track, see annotation to *Gross v. Omaha & C. B. Street R. Co.* L.R.A.1915A, 742.

The reported case (*BRITISH COLUMBIA ELECTRIC R. Co. v. LOACH*, *ante*, 882) involves an interesting and somewhat unusual point, that is, whether, notwithstanding the plaintiff's negligence in going upon the railway track, a recovery could be had where it appeared that the brakes on the car were duly applied and that the car which struck him would have stopped in time to have avoided the injury if the brakes had been in good order, and not defective. It will be observed that the question involved was as to whether the defendant's negligence in sending out and using a car equipped with improper and defective brakes, although anterior to the contributory negligence of the plaintiff, could be considered as the proximate cause or the "ultimate" negligence which brought about the injury. The court here declared that it could, stating that if it was not so held the company would be in a better position when it supplied a bad brake but a good motorman, than when the latter was careless but the brake furnished was efficient. This in reality constitutes the recognition of an exception to the last clear chance rule, which regards negligence by the defendant after that of the plaintiff as rendering the defendant liable, whereas in the reported case the negligence of the defendant precluding the defense of contributory negligence occurred before that of the plaintiff.

The court in the reported case (*BRITISH COLUMBIA ELECTRIC R. Co. v. LOACH*), relied upon *Brenner v. Toronto R. Co.* (1907) 13 Ont. L. Rep. 423, reversed on other grounds in (1908) 40 Can. S. C. 540, where it was held that the omission of the motorman of a car which struck the plaintiff, to turn off the power in approaching a crossing at a certain distance therefrom, prior to the time the plaintiff's danger was manifested, was negligence continuing up to 10 B. R. O.

the time of the accident, notwithstanding the plaintiff's contributory negligence.

The direct authority on the point under consideration is scant, and is not in entire harmony with the conclusion reached in *BRITISH COLUMBIA ELECTRIC R. CO. v. LOACH*.

Thus in *Smith v. Norfolk & S. R. Co.* (1894) 114 N. C. 728, 25 L.R.A. 287, 19 S. E. 863, 923, it was held that the failure of an engineer to stop a train, not due to any negligence after discovering the deceased on the track, but due rather to the lack of proper brakes, did not preclude the defense of contributory negligence on the part of one struck by the train. The third issue in this case was whether the defendant could have avoided the injury by the use of reasonable care, and the court here said: "We are of the opinion that there should be a new trial upon the charge of his Honor on the third issue. This issue was intended to present to the jury the principle of *Davies v. Mann* (1842) 10 Mees. & W. 546, 152 Eng. Reprint, 588, 12 L. J. Exch. N. S. 10, 6 Jur. 954, 19 Eng. Rul. Cas. 190, and the jury were instructed that the same law and facts which would constitute negligence under the first issue would be applicable to the third issue. The evidence upon the first issue tended to prove negligence on the part of the defendant by reason of its failure to keep a proper lookout in order to discover the deceased in time to avoid the accident, and also because of its failure properly to equip the train by providing sufficient brakes and brakemen. Now, as the doctrine of *Davies v. Mann* is based upon some omission of duty occurring after the negligence of the deceased, *Gunter v. Wicker* (1881) 85 N. C. 310 (which negligence was found by the court on the second issue), it is plain that there was error in blending these two essentially different elements of negligence,—the one existing prior, and the other occurring subsequently, to the negligence of the deceased,—and applying them indiscriminately to the third issue. We cannot know upon what phase of the testimony the jury acted in determining the question of negligence upon the first issue, and we have just as much right to assume that, under the charge of the court, they found that the negligence consisted simply in the failure to properly equip the train, as that they predicated it upon the alleged failure to observe ordinary care in keeping a reasonable lookout, etc. Under the first view, there can be no doubt that the finding upon the second issue would have barred a recovery; for if the engineer discovered the deceased as soon as he could have done so by keeping a proper lookout, and immediately applied all the means within his control to avoid the collision, and his failure to do so was by reason of the improper equipment of the train (an omission of duty which might have existed for weeks or months), then the negligence of the defendant would be no more proximate than that of
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the deceased, and there would be no ground whatever for the operation of the principle of *Davies v. Mann*. If this be not so, and the principle of that case is to be extended to negligence occurring both prior, as well as that which is subsequent, to the negligence of the deceased, it is perfectly useless to pretend that the doctrine of contributory negligence as to cases of this character has any place in the jurisprudence of this state."

And in *Grear v. Harvey* (1916) 195 Mo. App. 8, 177 S. W. 780, where the plaintiff was guilty of contributory negligence in driving on a car track, it was held that he could not recover under the last clear chance rule because of the defendant's negligence in operating the car which struck him with a defective brake, by reason of which the accident occurred. The court said: "Plaintiff's own negligence, which obviously contributed to place him in peril, prevents his recovery upon negligence of defendant in running the car with a defective brake. Such negligence cannot be treated as an element of a cause of action under the last chance rule, which merely takes into account conditions as they were at the time the peril of the plaintiff which ended in his injury became or should have become apparent to the operator of the dangerous instrumentality, and ignores the cause or causes of such peril."

In *Alabama & V. R. Co. v. McGee* (1918) 117 Miss. 371, 78 So. 296, where the plaintiff, who was injured by a train at a crossing, saw the train approaching, but because of the defective headlight on the engine supposed it to be a mile away, it was held that the engineer's failure to give warnings by whistle or bell, in connection with his failure to use a good headlight as required by statute, was the proximate cause of the plaintiff's injury, and that the latter at most was only guilty of contributory negligence.

It has been held that the failure of a railway company to comply with a statute requiring cars to be provided with fenders will not render a street railway liable for the death of a child who ran in front of a car, where the motorman would have had no time to have dropped the fender and have rendered it effective; since, although negligence was imputable in not complying with the statute, there must be a causal connection between the negligence and injury to warrant a recovery. *Cannon v. Alexandria* (1919) 144 La. 288, 80 So. 540.

J. T. W.

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[ENGLISH COURT OF APPEAL.]

PENNSYLVANIA COMPANY FOR INSURANCES ON
LIVES AND GRANTING ANNUITIES v. MUMFORD.

[1920] 2 K. B. 537.

Also Reported in 123 L. T. N. S. 248, [1920] W. N. 130, 36 Times L. R. 423.

Insurance — Fidelity bond insuring deposit company against loss by theft of securities "supposed or believed to be" upon insured's premises — Effect of prior abstraction unknown to customers.

The words "by them" as used in a policy issued to a safe deposit company insuring against losses by reason of abstraction or theft of any bonds "which now are or are by them supposed or believed to be . . . in or upon their premises" govern "believed" as well as "supposed," and it is not sufficient to bring a loss within such clause that securities which had been stolen by an employee before the issue of the policy were believed by customers to be on the premises at the date of the policy; and such clause does not apply where it appears that the deposit company knew before the date of issue that the securities had been withdrawn.

— Fidelity policy to safe deposit company — Clause insuring against loss "whilst in transit between houses or places" — Loss in transit between vault and reception room.

A "transit" between the vault and the customers' reception room is not a "transit between any houses or places" within the meaning of a clause in a policy insuring a safe deposit company against loss by reason of securities stolen or misappropriated by fraud of its officers "whilst in transit . . . between any houses or places within 100 miles" from the place where their business was situated, an intramural transit not being contemplated.

— Limitation of liability — Discovery at same time of losses occurring on different dates.

Semble, that under a policy of insurance against theft issued to a safe deposit company, providing that while the total liability in respect to "any single loss" is limited to the amount underwritten, any number of separate claims to that amount may, either on the same or on different days, arise against the insurer thereunder, subject only to his right on the happening of any loss to payment of the further premiums thereinafter provided for, the insurer's liability for loss arising from a number of different thefts at different times is not discharged *pro tanto* by payment for one, although all the thefts may have been discovered at the same time.

(March 18, 1920.)

APPEAL from the decision of Roche, J. [1920] 1 K. B. 314, in an action brought by the plaintiff company upon a Lloyds' policy of insurance, dated September 30, 1916, and underwritten by
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the defendant, whereby the several underwriters agreed, in the proportion which the sums underwritten by them bore to 20,000*l.*, to make good to the plaintiffs "all such direct losses as they . . . may during the space of twelve calendar months from noon of the 30th day of September, 1916, to noon of the 30th day of September, 1917, discover that they have sustained" in manner therein-after mentioned.

The terms of the policy and the facts of the case are fully stated in the report in the court below. [1920] 1 K. B. 314.

Roche, J., held that the defendant was not liable on the policy, and the plaintiffs appealed.

There was no appeal from the decision upon the counterclaim.

R. A. Wright, K.C., and Stuart Bevan, K.C., for the appellants.

MacKinnon, K.C., and J. G. Archibald, for the respondent.

[539] The arguments addressed to Roche, J., were repeated, and sufficiently appear from the following judgments of the Court of Appeal.

Cur. adv. vult.

Lord Sterndale, M.R.: This appeal arises out of a claim by the plaintiffs upon a policy of insurance underwritten by the defendant as one of a number of Lloyds' underwriters.

It formed one of a series of annual policies beginning in 1909, and was against all direct losses of the kind included in the policy which the plaintiffs might discover during the twelve months covered by the policy, provided such losses had occurred during the currency of the previous policies of the series.

The facts are most carefully and accurately stated in the judgment of Roche, J., and I do not propose to repeat them except so far as may be necessary to make the judgment intelligible.

The circumstances in which the claim arose are as follows. The plaintiffs had in their employment a trusted official called Williamson, who in the latter part of his service was secretary of the company. He took advantage of his position to misappropriate a number of securities belonging to four ladies, who were customers of the plaintiffs, to the aggregate value of over 10 B. R. C.

140,000%. These misappropriations took place on forty-one different occasions, extending over a series of years during the currency of the series of policies concerned in this case. In order to conceal his thefts Williamson was obliged to pay the interest to the customers, and for that purpose he kept a list of the securities. He was dismissed for some reason unconnected with these matters in October, 1916, and in May, 1917, it was discovered that a customer's securities were missing. Williamson was sent for, and asked about the matter, and he admitted that he had stolen the missing securities and others, and produced a list showing in all forty-one thefts, beginning in March, 1914, and ending in September, 1916. The method of the thefts is set out [540] in the report. [1920] 1 K. B. 314. Shortly, it was that Williamson obtained an order on the vault clerk to give him the securities, called a withdrawal card, signed by the official authorized to give such orders. There was no evidence as to the statements made by him on which he obtained the cards. Probably he told the official that the customer required the return of the securities, or it is possible that, by reason of his trusted position, it was not necessary for him to do more than ask for the card, on which the official would presume that the securities were required for a customer. Having obtained the card, Williamson presented it to the vault clerk, who delivered the securities to him, and Williamson at once appropriated them to his own use. He then produced documents, which he forged when necessary, to show that the securities had been delivered to the customer, and entries were made in the books showing that they had left the company's custody. None of the securities, therefore, were believed or supposed by the company to be upon their premises or that of any of their agencies when this policy began. The plaintiffs' claim was founded on two clauses in the policy,—i. e., those numbered 1 and 2. Very little stress was laid on clause 1, which is in these terms. [The Master of the Rolls read the clause, and continued:] It is not, I think, arguable that the loss falls within this clause. In order to do so the securities stolen must have been believed or supposed to have been on the plaintiffs' premises between September 30, 1916, and September 30, 1917, and as I have shown they were not, and were not supposed or believed to have been there, but were sup-

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posed or believed to have been returned to their owners before September 30, 1916. The appellants insisted much more strongly on their claim under clause 2. [His Lordship read it, and continued:] They contended that the securities were *in transit* as soon as they left the vault, and were delivered to Williamson, and that they were in transit from that time, although they might not be intended to leave the premises, but to be delivered, as they commonly were, to the customer in a room within the building. In [541] other words, it was contended that to take the securities from one room to another within the building was to put them *in transit* within the meaning of clause 2. The nature of the premises is thus described in the report. [1920] 1 K. B. 317. [His Lordship read the passage, and continued:] I think this contention of the plaintiffs is wrong. The governing words as to transit are that it must be between houses or places, and I think places must be read to mean some distinct premises in the sense that houses are distinct from one another, and that the word was probably put in to cover such places as the recognized places of safe deposit mentioned in clause 1. To move securities from one room to another in the same building seems to me to put them *in transit*, if at all, from one part to another part of the same place, and not from one place to another. This is strengthened, I think, by a comparison of clauses 1 and 2, of which the former appears to deal with the securities on the plaintiffs' premises and the latter with them *in transit* to or from such premises, though the transit from them is made by the last words of the clause to begin before the securities have actually left the premises.

If this be right, then in order to come within the clause the securities must have been *in transit* to some place outside the plaintiffs' premises. I see no evidence at all that they were. In fact they never were *in transit* at all except from the vault clerk's hand to that of the thief, who immediately appropriated them; but I will assume that if the official, when he signed the withdrawal card, meant to start them on a transit outside the premises the clause would be satisfied. I do not, however, decide that it would. But on this assumption there is no evidence that these securities were not to be delivered within the premises. It was shown that the customers to whom they belonged commonly called

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or sent for securities which they wanted, and there is nothing whatever to show that the official when he signed the card had any information that led him to suppose that these particular securities were to be sent outside the premises rather than handed over in the waiting room to which [542] customers went. I think these securities were not *in transit* between any houses or places when they were stolen.

It was also contended by the defendant that the plaintiffs failed to bring the case within the clause on another ground—*i. e.*, that the definition “securities of this description” in clause 2 introduced into the clause all the words in clause 1 down to the word “being,” and that therefore securities *in transit* were only within the policy if they had been, or were supposed or believed to have been, on the premises during the twelve months mentioned in the policy.

In the view I have taken of the clause it is not necessary to decide this point, and I express no opinion on it.

A further and important question arises as to the amount of liability in case the plaintiffs had established their claim. This is not material if the defendants are, as I think, not liable at all, but as it was strenuously argued before us, I think I should express my opinion on it.

It arises upon the following proviso: “Provided that the total liability of each of the undersigned in respect of any one loss under this guaranty is limited to the amount underwritten by him irrespective of the total value of the securities comprised in such loss, and that in estimating the amount of such securities so lost as aforesaid the value of the same shall be taken at the average market price or value in Philadelphia or New York on the day of the discovery of such loss or losses respectively, . . . and if there be no market price or value of the same or any of them on such day then the value thereof shall be the value as agreed between the respective parties or in the event of difference as ascertained by arbitration. And further that upon any loss happening under this insurance (and subject to the due payment thereof) a further premium calculated at *pro rata* of the annual premium for the unexpired time on the amount of such loss shall be payable by the assured to the undersigned, and that as from the time

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of the happening or discovery of such loss, and even although the further premium may not meanwhile have been actually paid, this insurance shall be treated as renewed so as at all times during the said period [543] of twelve calendar months to continue as an insurance to the full extent of 20,000*l.* notwithstanding any previous loss which the undersigned may have paid or be liable to pay hereunder, the true intent and meaning of these presents being that while the total liability of each of the undersigned in respect of any single loss is to be limited to the amount underwritten by him, any number of separate claims to that amount may either on the same or on different days arise against him hereunder subject only to his right on the happening of any loss to payment of the further premiums hereinbefore mentioned and provided for." The contention of the defendant is that "any one loss" in the beginning of this proviso means any one discovery of losses which gives rise to a claim. I do not agree with this. I think the words I have quoted from the beginning of the policy, "All such direct losses as the company may discover," point to a distinction between loss and discovery, and in the proviso itself I find the expression "discovery of such loss or losses," which points in the same way. I think the limitation is to an amount for each loss, and that it is immaterial whether the losses are discovered at one or at different times during the currency of the same policy.

There were several items of the claim arising from the theft of certain securities which Williamson had been instructed to buy for customers, and which he had stolen before they reached the plaintiffs' premises. These were said to stand on a different footing from the other items, but I do not think it necessary to consider them for this reason. The defendants before this action, not appreciating that they had a defense—except as to amount—paid to the plaintiffs 20,000*l.*, and Roche, J., has decided that they cannot recover it back. Against this part of his judgment there is no appeal, and therefore the plaintiffs retain a sum of money far more than sufficient to satisfy their claim as to these items. I think the appeal should be dismissed, with costs.

Warrington, L.J.: This is an appeal by the plaintiffs from a judgment of Roche, J., dismissing their action. The [544] *ac-*
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tion was on a policy of insurance against loss by theft. The defense was twofold: (1) That the loss in question was not covered by the policy. (2) That if it was, the liability of the underwriters was limited to 20,000*l.*, and this sum they had paid. The decision on both heads turns on the true construction of the policy. Roche, J., has decided in the defendant's favor on the first head. On the second he has expressed an opinion in favor of the plaintiffs.

The plaintiffs are an American company carrying on business in Philadelphia amongst other places. At their office in Philadelphia part of their business is to receive securities from their customers for safe deposit, and to collect dividends and interest thereon.

Between September, 1909, and October, 1916, one Williamson was a trusted servant of the plaintiffs at their office in Philadelphia, and from 1913 he was their secretary. In accordance with the practice of the company certain customers were specially allocated to Williamson, and amongst them four ladies.

Between September, 1909, and September 23, 1916, Williamson fraudulently obtained possession of and disposed for his own purposes of securities of these ladies of the value of upwards of 140,000*l.*

In accordance with the ordinary routine of the company he obtained from the proper officer his signature to withdrawal cards on a false statement that the customers desired to withdraw their securities. Armed with these cards he obtained the securities from the clerk in charge of the vault where they were deposited. He subsequently produced receipts forged by him but purporting to acknowledge the receipt of the securities by the customers, and regular entries of the withdrawal were made in the company's books. The officials of the company, therefore, were led to believe that the securities were no longer deposited with them. These transactions all took place before September 30, 1916.

As to seven items the procedure was different. These were securities purchased for the customer with moneys standing to her credit with the company in respect of [545] dividends and interest collected for her. They were obtained by Williamson from the brokers, were made away with by him, and never came into

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the custody of the company at all, though they were delivered by the brokers to Williamson or his messenger for the purpose of being deposited with them. These fraudulent transactions of Williamson all took place before September 30, 1916, but the loss was not discovered till May, 1917, when, on being asked for an explanation as to the securities of one customer, he made a clean breast of it, and confessed to the whole series of thefts and forgeries. There were in all forty-one separate cases. The plaintiff company, having made good the losses to their customers, claimed against the underwriters under the policy. They, apparently not appreciating that they might successfully contend that the losses were not covered by the policy, paid 20,000*l.*, being, as they considered, the limit of their liability. The company then claimed the balance of the 140,000*l.* This the underwriters refused to pay; this action was then brought, and the defenses above mentioned were raised.

The policy is a Lloyd's policy, and is dated September 30, 1916. The underwriters thereby agreed in the proportions which the sum underwritten by them bore to 20,000*l.*, to make good to the plaintiffs "all such direct losses as they may during the space of twelve calendar months from noon of the 30th day of September, 1916, to noon of the 30th day of September, 1917, discover that they have sustained in manner hereinafter mentioned, that is to say." [His Lordship read clauses 1 and 2 of the policy and the proviso thereto, and continued:] It was not seriously contended before us that the losses in question came within the first clause; the securities could not be supposed or believed by the company to be in their custody at the date of the policy, their books showing that they had been withdrawn before that date. The fight has ranged round the second clause.

The defendant contended: First, that the whole of clause 1 down to and including the words immediately preceding "being . . . lost" form part of the description of the securities covered [546] by clause 2, and that the securities in question not being within clause 1 were not within clause 2 either.

I agree with Roche, J., that this contention fails. I think the word "description" is appropriately used to connote the quality of the thing referred to, and not appropriate to indicate external

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conditions applicable to it. Moreover, to give effect to the defendant's contention in this respect would be to exclude from clause 2 securities intrusted to a servant of the company for conveyance to them for the purpose of deposit, a result which I hardly think can have been intended.

But the defendant raises what to my mind is a much more serious contention. He says the underwriters are responsible for securities only whilst *in transit* between houses or places, and, as regards all the cases except the seven special cases above referred to, there was no evidence of the securities ever having been *in transit* except within the company's premises themselves, and such a transit is not, within the meaning of the clause, "transit between houses or places." I think this contention is well founded. It seems to me that loss while on the company's premises, whether the securities are in the accustomed place of deposit or are being carried from one part of the premises to another, is contemplated by clause 1, and that the transit in clause 2 is intended to cover a loss not covered by clause 1.

There was in fact no evidence of any transit except from the actual place of deposit to Williamson's possession, nor was there any evidence that any part of such transit was outside the plaintiffs' premises. There was not any evidence that even if the withdrawal had been a genuine withdrawal there would have been any transit except from the vault to the customer in the waiting room. I agree with the learned judge that there was no evidence of the securities being at the time of loss *in transit* within the meaning of clause 2, and therefore the appeal on this point fails. As to the special items, I think there was evidence that they were *in transit* from the purchasing brokers' office to the company's safe deposit, but this makes in this case no difference [547] to the result, inasmuch as the loss in this respect is more than covered by the 20,000*l.* already paid. The learned judge has said, on the construction of the proviso, that if it were necessary so to decide he would be prepared to hold that the liability is not limited to the 20,000*l.* I agree with him on this point. I think there were in fact forty-one different losses, though they were discovered on the same day. The proviso seems to me to work this out by providing that a payment for one loss shall not even *pro tanto* ex-

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tinguish the liability of the underwriter, provided a premium is paid calculated as to amount by the proportion the amount of the loss bears to 20,000*l.*, and as to period by the proportion the unexpired period bears to twelve months, and that, subject to such premium being paid, the amount of any number of losses may be discovered on the same day. This last point makes no difference to the result, which is that, the losses in question not being covered by the policy, the learned judge was right in dismissing the action, and this appeal must also be dismissed.

Scrutton, L.J.: I do not repeat the facts of this case as stated by Roche, J. It is enough to say that the claim is by a trust company against underwriters on a common form of Lloyds' policy for loss, by fraud of the company's servants, of securities intrusted to them by customers, and that the nature of the fraud is not that the securities were fraudulently abstracted by the servant, while the company thought the goods remained on their premises, but that the servant by fraud and forgery induced the company to think that the goods were asked for by and delivered to the customer, and so left their possession, when in fact the servant never had a request from the customer for the securities, nor delivered them to the customer. The scheme of the policy is that it is one of a series of consecutive policies, liability on which is fixed primarily by the year in which the loss is discovered, not by the year in which it happened.

There are two heads of loss insured, the first (clause 1) relating to loss while the securities are stationary, or in [548] custody; the second (clause 2) relating to loss while the securities are *in transit*. It was hardly argued that there was a valid claim under clause 1, for that clause was confined to the loss of securities which either were or were believed by the company to be in their custody at the date of the policy, or were in such custody during the twelve months of the policy. These words are applicable to the case of surreptitious abstraction before the date of the policy from the company of securities which they still believe to remain in their possession, but are not applicable to cases where the company, before the date of the policy, are induced to part with the securities in the belief induced by the fraud of their

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servant that they are delivering them to the customer. Such securities are at the date of the policy neither in the custody of the company, nor supposed or believed by the company to be in their custody. I pass therefore from clause 1, which is only of this further importance, that its inadequacy for the facts of this case makes it clear that the policy had not been carefully framed to cover all probable cases of loss of securities. The meaning of clause 2, the clause covering loss whilst *in transit* is more doubtful. It begins: "By reason of any securities of the description above specified." It is argued for the underwriters that these words incorporate in clause 2 all the limitations of "bonds and, or similar securities," contained in clause 1 before the next material phrase "being lost," so as to include the limitation to securities which now are, or are supposed or believed to be, on their premises. It is argued for the company that "description" did not include these words, although they did define or determine the securities which were included in the protection of the first clause. Asked where, in clause 1, the "description" ended, counsel for the company were in a difficulty. They were at first inclined to say at the word "undertaken," for it was obvious that some such limitation as to interest or custody was necessary in clause 2. Finally, to say this, however, rendered it difficult for them to cut out of the "description" the words which followed beginning "and which," so they elected to say that the description [549] stopped at "landed property," and that the limitation of interest or custody was implied in clause 2, not incorporated expressly by the word "description." I have come to the conclusion that the words "description above specified" incorporate all the words which determine or define the subject-matter exposed to loss, and therefore incorporate the limitation to securities on the premises, or believed or supposed to be there. To illustrate, if clause 1 were on "cattle, sheep, or other animals on my Sussex farm for at least twelve months before the date of the policy," the "description above specified" would, in my opinion, include the time and place definition as well as the enumeration of the animals. The point does not admit of prolonged reasoning; to the best of my judgment that is the meaning. It is true this reading excludes some matters from clause 2 which one might expect to have been covered.

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ered, though not such important matters as those which it is clear are excluded from the first clause. It is true that if the securities first came from the customer *in transit* by the hands of officers of the company (an unusual course I should think) they will not be covered till they reach the company's premises, or are believed by the company to have reached them. So also loss *in transit* before the commencement of the policy will not be covered, though discovered during the currency of the policy, unless the securities in fact lost were believed by the company to be on their premises at the date of the policy. But a policy which allowed the larger gap in the first clause may easily, by defective expression, leave those smaller gaps in the second clause. Mr. Justice Roche thought that "description" did not cover local position. I cannot agree; it seems to me it can easily cover both enumeration of securities and definition or limitation of them to those possessing certain attributes relating to time or space. This point is enough to support the judgment below, and dispose of all claims by the company. But the judge below decided in the underwriters' favor on another ground, to which I now turn.

Did the loss occur on a transit? Of the actual facts we [550] know very little. To get the securities from the vault in which they were deposited the thief must have obtained a withdrawal card from a high officer of the company. If he was asked at all why he wanted a withdrawal card he probably said that the customer wanted to withdraw the securities; but there is no actual evidence as to whether he was asked anything, or what he said if he was asked. All the customers whose securities were stolen were ladies. There is evidence that two of them as a rule called at the company's office when they had business. Of the other two, one "does not come much, if at all. We generally send to her or she sent a maid sometimes." The other "much the same, or a son would come." It is quite consistent with the facts that the thief represented that the customer had called or was going to call for her securities, and that he would take the securities from the safe and deliver them to the customer on the company's premises. But there is no evidence as to what actually happened, or even was supposed by the company to be happening. All that is known is that the thief got the securities out of the safe by a withdrawal.

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card, as to which it is not known by what representations, if any, he got it, and misappropriated them in some way and place unknown, but probably as soon as he got them out of the safe. The material words defining the transit insured are "*whilst in transit . . . in the hands of their officers, clerks, or servants or any messengers between any houses or places situate within 100 miles from P. . . . such risk or transit to commence on every security or parcel of securities from the moment of the person into whose hands the same may be delivered on behalf of the assured receiving the same and to continue until the delivery thereof at destination.*"

But for the latter words of this clause I should think that operations within the company's offices were not a transit; in my opinion, however, the latter words show that if there is a transit "*between houses or places*" it may begin in the first house and end in the second. It is, however, a considerable step further to say that an operation both beginning and ending in the first "*house*" is a transit between houses [551] or places. Examples of this would be taking the securities from the safe to another room in the office for the auditors to examine them and returning them to the safe, or taking them from the safe to give to a customer in the waiting room in the company's office. Neither of these, in my view, would be a transit between "*houses or places.*" I can understand that where an official takes securities from the safe in Philadelphia ostensibly to deliver them to a customer in Boston, there is a "*transit*" from Philadelphia to Boston, and it begins when the official takes them from the safe—but there is in that case a transit between "*houses or places.*" In the cases above put there is no "*transit between houses or places,*" and the plaintiff company is, in my opinion, in this further difficulty—that they must give evidence of a transit in which the goods were lost, and they prove nothing as to the actual or intended transit. It is quite consistent with the evidence that the thief said he wanted the securities to deliver to a customer in the waiting room; it is quite possible he said nothing except to ask for a signature, but was trusted. Of what transit was intended there appears to me to be no evidence; no evidence also of what transit, if any, commenced. The thief walked away with the securities in his hand or his

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pocket. These reasons, which I have stated in my own words, lead me to concur in the result of Mr. Justice Roche's judgment on this point.

A third point arises in a curious way. My previous views render it unnecessary to decide it, but as the underwriters argued it strenuously, and obviously attached great importance to it, I express my opinion on it. For with great respect to the eminent authorities at Lloyds' who are responsible for this common form policy, if it means what their counsel contend it means, the sooner it is put into language intelligible to ordinary assured the better, and the occasion of this revision might be made the opportunity for recasting it so as to cover the losses which occurred in this case, which clearly should be within the scope of such a common form policy. The policy is on all such direct losses as the assured may discover during the currency of the policy, and which have [552] happened since the first policy was taken out seven years before. It is for 20,000*l.*; and there is a provision that on the occurrence of a loss and payment, the amount insured may be again raised to the original figure by payment of a fresh premium; "the true intent and meaning of these presents being that while the total liability of each of the undersigned in respect of any single loss is to be limited to the amount underwritten by him, any number of separate claims to that amount may either on the same or on different days arise against him hereunder subject only to his right on the happening of any loss to payment of the further premiums hereinbefore mentioned and provided for." That is to say, supposing a theft of 20,000*l.* has taken place on January 1 in each of the seven years commencing January 1, 1910, and these seven thefts are discovered on seven consecutive days in October, 1916, there will be a claim for seven times 20,000*l.*, on the appropriate premiums being paid. I understand the counsel for the underwriters to admit this, but to contend that if the seven thefts were all discovered at the same time, there would only be a claim for one loss of 20,000*l.* Their reason for this was that it was the discovery, not the theft, that made the loss, and there was only one discovery. This, in my view, is quite erroneous. The policy is against direct losses, discovered during the year; "any one loss" refers to the loss, not to the discovery.

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"Separate claims for any single loss" may arise on the same day, and by the same discovery of the various single losses. I was quite unable to understand, or see any ground for the argument of the underwriters to the contrary, or any difficulty in calculation of the premiums to be paid for several losses above the 20,000*l.* limit all discovered at the same time. - Originally this was the only point fought by the underwriters, who paid one loss of 20,000*l.* When this was not accepted in settlement they raised the other points which I have held good in answer to the claim, but they have paid 20,000*l.* This fact renders it unnecessary to consider some special cases amounting in all to \$14,000 only, which were said not to come within the general points already decided; for [553] if the underwriters are liable for them they have paid a much larger sum.

For these reasons I think the result of the judgment of Roche, J., should be affirmed, and the appeal dismissed, with costs.

Appeal dismissed.

Solicitors for appellants: *Paines, Blyth, & Huxtable.*

Solicitors for respondent: *Parker, Garrett, & Company.*

Note.—Losses covered by fidelity bond or policy issued to bank or safe deposit company.

As to discharge of surety on fidelity obligation by failure of employer to discover delinquency or to notify surety thereof within time specified in the obligation, see annotation to *Larrabee v. Title Guaranty & S. Co.* L.R.A.1916F, 715.

This note is confined to a consideration of the character or manner of loss contemplated, and it does not deal with the time covered by fidelity policies, or the question whether a loss sustained while an employee was acting in a capacity other than that stated in the policy was within its contemplation.

Introduction.

In construing policies of fidelity insurance and bonds given to indemnify banks or trust companies where two constructions of the instrument of indemnity are possible the one most favorable to the insurer will be adopted. *Dominion Trust Co. v. National Surety Co.* (1915) 137 C. C. A. 342, 221 Fed. 618, Ann. Cas. 1917C, 447; *Title Guaranty & S. Co. v. Bank of Fulton* (1909) 89 Ark. 471, 33 L.R.A.(N.S.) 676, 117 S. W. 537; *Farmers' & M. State Bank v.* 10 B. R. C.

United States Fidelity & G. Co. (1911) 28 S. D. 315, 36 L.R.A. (N.S.) 1152, 133 N. W. 247.

This rule, however, cannot be availed of to refine away the terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties. *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* (1902) 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124.

The reported case (*PENNSYLVANIA CO. v. MUMFORD*, *ante*, 895) involves points which are at the same time interesting and distinctive. It will be observed that in that case, where an employee of a deposit company who appropriated securities on deposit with the company to his own use obtained possession of them from the vault clerk by fraudulently pretending that he was authorized to receive them to take to the owner in a room in the company's building, it was held that conveying the securities from one room to another within the building did not put them *in transit* within the meaning of a policy insuring against loss by reason of securities being stolen, misappropriated, or made away with "*whilst in transit . . . between any houses or places.*"

In *United States Fidelity & G. Co. v. Union Bank* (1917) 39 Ont. L. Rep. 338, where an employee took money from a package belonging to a bank, which was being transferred from a branch office, and used the money to make up a shortage in the bank caused by a prior abstraction, it was held that an insurer, issuing a bond after the first abstraction, was not liable on the bond which guaranteed to pay the employer such pecuniary loss as the employer should sustain by theft. The court said: "The facts in the case are not in dispute, but the defendant and the third party contend that immediately Desjardins appropriated the \$2,010 the theft was complete, and the plaintiff became liable upon its bond. Desjardins, who was a witness, stated that when he took from the bag which contained the \$6,570 the amount to cover his shortage, he intended to steal the same, and in this manner to appropriate it to his own use, which he did by depositing it with the funds of the bank and so wiping out his shortage. I think it clear beyond question that the theft of the \$2,010 so applied was complete, and if that fact constitutes a defense the plaintiff must fail. But the question turns upon the form of the bond. The plaintiff by its bond 'guaranteed to pay to the Union Bank of Canada, the employer, such pecuniary loss as the employer shall sustain . . . by theft,' etc. In this case, although the theft was complete, there was no pecuniary loss by reason of the theft. It was immediately paid in to the bank, but all the time it was the bank's money, even while in the hands of Desjardins. Suppose the bag containing the money had been carried to the private house of Desjardins and there recovered by an officer of the bank.

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In such case it is clear beyond argument that the bank could not recover upon the bond, because it had suffered no pecuniary loss; and what was done here is in effect the same, indeed rather stronger in favor of the plaintiff, for the money never in fact left the custody of the bank, although the theft was complete. It makes no difference, as between the plaintiff and the bank, that Desjardins applied it to cover a shortage. The plaintiff was not in fact liable for the shortage of Desjardins, which took place before the plaintiff's bond to the defendant was given." An interesting case, and apparently the only one which has passed on the point involved, is found in *American Sav. Bank & T. Co. v. National Surety Co.* (1916) 91 Wash. 307, L.R.A.1916F, 435, 157 Pac. 877, in which it was held that the employee causing the loss must be identified in order to warrant a recovery under a policy undertaking to make good any loss which an employer may sustain by reason of the act of any employee named in a certain schedule attached, specifying different amounts of indemnity as to each, and providing for determination of liability with respect to each employee discovered in default, and consequently no recovery can be had for loss of which the only knowledge is that it must have been caused by one or more of three employees named in the schedule.

Provisions for faithful performance of duties, etc.

Provisions for the faithful performance of duties by employees of banks or trust companies are common in fidelity policies or bonds.

In *Minor v. Mechanics' Bank* (1828) 1 Pet. 46, 7 L. ed. 47, the court, in upholding a right to recover for breach of a cashier's bond conditioned to well and truly execute his duties, where on leaving the bank he failed to pay over or account for a portion of the bank's money received by him, and holding that it might be inferred that such money was wilfully wasted by the cashier or applied to his own use, said: "It has been argued that this instruction is the more material and injurious to the defendants because it proceeds, in the latter part, upon a misconstruction of the true import of the condition of the bond. The condition, that Minor shall 'well and truly execute the duties of cashier' of the bank, is said to be merely a stipulation for honesty in the discharge of the duties, and not for skill, capacity, or diligence. We are of a different opinion. 'Well and truly to execute the duties of the office' includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskilfully—if they are violated, from want of capacity or want of care—they can never be said to be 'well and truly executed.' The operations of a bank require diligence, with fitness and capacity, as well as honesty, in its cashier; and the security for the faithful dis-
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charge of his duties would be utterly illusory if we were to narrow down its import to a guaranty against personal fraud only."

And it has been held that there is a breach of a bond conditioned that a cashier shall well and faithfully discharge the duties imposed upon him as cashier by the character and by laws, and all other duties which may be imposed upon him, where he misappropriated funds of the bank pretending that he had borrowed them, although there were no by-laws, and the charter merely required him to make oath that he would discharge his duties diligently, honestly, and impartially, and prohibited him from borrowing from the bank. *McShane v. Howard Bank* (1890) 73 Md. 135, 10 L.R.A. 552, 20 Atl. 776.

And under a bond of a cashier that he shall "well and truly" perform the duties of cashier "to the best of his abilities" the liability is not restricted to acts of infidelity and dishonesty, and a liability attaches where the cashier transcends his powers and changes securities of the bank in abuse of his trust. *Barrington v. Bank of Washington* (1826) 14 Serg. & R. 405.

And there is a breach of a bond given on behalf of a cashier conditioned that he will "honestly and in good faith perform all the duties of cashier," where he misappropriates stock of the bank which he had taken in his own name as security for a note to the bank, which he indorsed in order to evade the prohibition against loans by the bank on the security of its own stock. *Walden Nat. Bank v. Birch* (1891) 130 N. Y. 221, 14 L.R.A. 211, 29 N. E. 127.

And in *Wallace v. Exchange Bank* (1890) 126 Ind. 265, 26 N. E. 175, where a bond undertook that the cashier of a bank should faithfully and honestly do and perform all the duties of his office, it was held that the obligors were liable for large sums of money belonging to the bank which were invested in illegal transactions by the cashier.

And where it is proven that a cashier of an insured bank had loaned himself, without authority, excessive amounts of the bank's funds without taking security, and that his bills receivable were considerably less in their aggregate than his bills receivable account carried on the books of the bank, it cannot be said that it has not been proved that he has misappropriated the funds of the bank; and the fact that he has placed his worthless notes in the bank for the amount of the funds used or taken by him does not affect the substance of the transaction or change its real character. *National Surety Co. v. Williams* (1917) 74 Fla. 446, 77 So. 212.

And it has been held that embezzlement of the bank's funds by an assistant bookkeeper under cover of false entries in the books of the bank is covered by a bond conditioned for the faithful discharge of the trust reposed in him as such assistant cashier, the court hold-

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ing that the abstraction was included although it constituted a felony. *Rochester City Bank v. Elwood* (1860) 21 N. Y. 88.

But in *Allison v. Farmers' Bank* (1828) 6 Rand. (Va.) 204, a bond conditioned that a bank employee should faithfully perform the duties assigned to, or trust reposed in, him as accountant, and should be of good behavior in office, was held not breached where the employee stole money, the court holding that the bond was not intended to insure against losses by the commission of felonies.

In *Bank of Toronto v. European Assur. Soc.* (1870) 14 Lower Can. Jur. 186, where a bond undertook to indemnify a bank against loss or damage by reason of the want of integrity, honesty, or fidelity, or by the negligence or default, of the bank's manager, it was held that there was a breach of the bond by reason of the manager's allowing overdrafts by a depositor, and in concealing and acting in concert with the depositor.

Conditions against loss by larceny or embezzlement, etc.

In construing policies providing for indemnity against loss by acts amounting to embezzlement or larceny, there is a difference of opinion among the courts as to whether the facts must be such as would justify a criminal conviction in order to recover on the obligations.

It has been held unnecessary to show circumstances sufficient to constitute the crime of embezzlement or larceny in order to recover under a bond undertaking to reimburse a bank for all pecuniary loss sustained by reason of the fraud or dishonesty of a named person in connection with the duties of his office "amounting to embezzlement or larceny." *Delaware State Bank v. Colton* (1918) 102 Kan. 365, 170 Pac. 992. The court said: "It was not necessary that the petition should allege, or that the proof should establish, facts sufficient to constitute the crime of embezzlement or larceny. The purpose of the bond was to indemnify the bank against pecuniary loss occasioned through the fraud or dishonesty of Colton in connection with his duties as cashier, and the words 'amounting to embezzlement or larceny' cannot be given the effect contended for. They do not so far qualify the words 'fraud and dishonesty' as to relieve the surety company from liability until the bank produced testimony which would have been sufficient in a criminal case to convict Colton of one of these crimes. Bonds of this character are to be construed most strongly against the surety company. It is not in the position of a private surety, who is favored by the law and permitted to rely upon technical defenses. . . . The surety company prepares the bonds on its own forms, and the courts as a general rule construe them as intended to protect the obligee from loss occasioned by the dishonest and fraudulent acts of the principal, wholly regardless of whether or

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not the principal might upon the facts established have been convicted of embezzlement or larceny."

And the evidence in *Delaware State Bank v. Colton*, *supra*, was held to justify the conclusion that a cashier's conduct amounted to embezzlement within the policy involved, there being testimony that the employee had misappropriated property belonging to the bank.

And in *National Surety Co. v. Williams* (1919) 74 Fla. 446, 77 So. 212, it was held that in order that liability might attach on a bond insuring a bank against "fraud and dishonesty, including larceny or embezzlement, forgery, and misappropriation of funds" by an employee, it was not necessary for the employer to introduce such evidence as would be necessary to convict the employee of the crime of larceny or embezzlement before liability upon the bond attaches. And the insurer was held liable for a loss resulting where the bank employee put his note, which was of no value, in the bank and issued a certificate of deposit of the bank for a like amount, which he used to purchase stock in another company. The court stated that the transaction was in legal effect the same as if he had taken the cash out of the bank and used it to purchase the property, and that there was a misappropriation which was fraudulent and dishonest. But it was further held that the insurer was not liable for the amount of notes given by the employee for shares of stock in the bank, it appearing that other shareholders did the same, and that when the employee left the bank's employ he left the shares of stock and made no claim to them.

And in *London Guarantee & Acci. Co. v. Hochelago Bank* (1893) Rap. Jud. Quebec 3 B. R. 25, although there was no technical embezzlement, it was held that there was a breach of a bond indemnifying against loss "by fraud and dishonesty amounting to embezzlement," where the cashier caused his checks to a large amount to be certified by the ledger keeper, although he had not funds on deposit to cover the checks.

But in *Dominion Trust Co. v. National Surety Co.* (1915) 137 C. C. A. 342, 221 Fed. 618, Ann. Cas. 1917C, 447, where a president of a trust company, who was also a shareholder, from time to time surrendered his certificates to himself as president, canceled them, and as president reissued new shares to himself for greatly increased numbers, and subsequently sold the certificates, it was held that no liability attached on a bond conditioned to make good pecuniary losses sustained by the trust company through the personal dishonesty of its employee "amounting to larceny or embezzlement," since the acts done did not amount to larceny or embezzlement.

And in *Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co.* (1902) 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124, *rev'g* on other grounds (1900) 40 C. C. A. 542, 100 Fed. 559, it was held that 10 B. R. C.

there could be no recovery under a bond indemnifying against loss by the fraudulent actions of a bank cashier which were equivalent to embezzlement or larceny, where a loss resulted on account of overdrafts paid by him without authority, it not appearing that he received any benefit from the transaction, since the acts were not equivalent to embezzlement or larceny.

And in *Farmers' State Bank v. Title Guaranty & T. Co.* (1908) 133 Mo. App. 705, 113 S. W. 1147, where a bond undertook to "make good and reimburse to the said employer such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of the said employee in connection with the duties of his office or position amounting to embezzlement or larceny," it was held that the fraud or dishonesty shown must be such as to amount to embezzlement or larceny to warrant a recovery, and that no recovery could be had for a loss sustained merely by his fraud, not amounting to a crime; and where there was evidence that the employee intended to convert the funds of the bank to his own uses the proof was held insufficient to warrant a recovery.

And in *United States Fidelity & G. Co. v. Bank of Batesville* (1908) 87 Ark. 948, 112 S. W. 957, where the fidelity bond provided that the company should "make good and reimburse to the employer all and any pecuniary loss sustained by the employer of money, securities, or other personal property in the possession of the employer, or for the possession of which he is responsible by any act of fraud or dishonesty on the part of said employee in the discharge of the duties of his office or position . . . amounting to larceny or embezzlement," it was held that the obligation did not cover every liability or claim which might accrue in favor of the employer and against the employee, but that loss by larceny or embezzlement by the employee must be proved; and the evidence in this case, showing a shortage by an employee of a bank, who was furnished with money to buy time checks, and which indicated that some of the money had been used for his personal expenses, was held insufficient to show dishonesty amounting to larceny or embezzlement.

In *Livingston v. Fidelity & D. Co.* (1905) 27 Ohio C. C. 662, it was held that the secretary of a building and loan company was guilty of embezzlement within the meaning of the Ohio statute and also within the meaning of a bond undertaking to indemnify if his acts amounted to embezzlement or larceny, where the secretary bought cheap vacant lots in a certain city under fictitious names and applied to the company in these names for loans, which were granted by the directors on his recommendations, and checks issued to the fictitious persons were turned over to the secretary, who indorsed them in the names of the fictitious persons and appropriated the proceeds.

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And under a bond given on behalf of a cashier, conditioned to make good "such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of said employee . . . amounting to embezzlement or larceny," there is a breach of the condition where the cashier issued the bank's drafts payable to a third party, knowing that the party had no funds in the bank, and under a promise of personal gain, by reason of which the bank sustained a loss. *Rankin v. United States Fidelity & G. Co.* (1912) 86 Ohio St. 267, 99 N. E. 314.

It has been held that there was a "wilful misapplication of funds" within the meaning of the bond of a bank teller, where he drew a check on the bank, with knowledge that he had not a balance to his account sufficient to pay it, and when the check was received from the exchange messenger the teller got possession of it and contrived that it should not be charged to his account, and falsified the books to conceal his act. *Roseville Trust Co. v. American Surety Co.* (1918) 91 N. J. L. 588, 103 Atl. 182. The court said: "The question whether or not these acts constituted embezzlement (an offense differing from wilful misapplication—*United States v. Northway* (1887) 120 U. S. 327, 30 L. ed. 664, 7 Sup. Ct. Rep. 580) is one that we are not now called upon to consider. They undoubtedly constituted a wilful misapplication of funds, and that is sufficient for recovery in the present case. The funds of a trust company are 'wilfully misapplied' by its teller when he converts them to his own use or benefit, or to the use and benefit of someone other than the trust company, with intent to injure and defraud the trust company. . . . By the term 'wilfully' is meant purposely or designedly. The intent to injure and defraud, which is necessary to constitute a wilful misapplication, does not necessarily involve any malice or ill will, but merely that general intent to injure and defraud which always arises, in contemplation of law, when one wilfully or intentionally does that which is illegal and fraudulent, and which, in its necessary and natural consequences, must injure another. . . . In the case at bar the evidence shows, and indeed the defendant Jennings (the teller) in effect admits, that he designedly and intentionally did the following fraudulent and illegal things: (1) He drew and gave his \$2,000 check on the plaintiff trust company, knowing that his balance was insufficient to meet it (a misdemeanor, when done, as here, by an officer or employee—Comp. Stat. p. 5661, § 15); (2) he caused the check to be paid by the trust company to its loss; (3) he abstracted the check itself; (4) he contrived that the check should not be charged to his account; (5) he falsified the accounts and books for the purpose of concealing the abstraction (a high misdemeanor—Comp. Stat. p. 5661, § 17). The necessary effect of these acts was the conversion of funds
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of the trust company to his use and benefit, to the pecuniary loss of the company, and constituted a wilful misapplication of its funds."

In *Century Bank v. Young* (1914) 84 L. J. K. B. N. S. 385, where a policy insured a bank against loss occasioned "by reason of any . . . currency, coin, or other similar securities . . . which during the said period of twelve months may be in or upon their own premises . . . being . . . lost, destroyed, or otherwise made away with by robbery, theft, fire, embezzlement, burglary or abstraction, or taken out of their possession or control by any fraudulent means," it has been decided that no recovery can be had on losses sustained by discounting bills deposited by a customer, which were forgeries and worthless, the court holding that the policy contemplated certain securities being taken away from the bank by fraud, and that it did not cover all banking losses.

Provisions against loss by negligence, omission, or commission.

In *Crown Bank v. London Guarantee & Acci. Co.* (1908) 17 Ont. L. Rep. 95, where a policy undertook to reimburse a bank employing a cashier and accountant for "all and any pecuniary loss sustained by the plaintiffs directly occasioned by dishonesty or negligence . . . in connection with their duties in the plaintiffs' service," the insurer was held liable for the loss sustained through the accountant as well as the cashier, where the latter at the close of a business day abstracted a large sum from the money in his possession, and through the negligence of the accountant, whose duty it was to check up the cashier's account, the abstraction was not discovered until the cashier had taken the money from the bank and left the country.

And in *First Nat. Bank v. United States Fidelity & G. Co.* (1912) 150 Wis. 601, 137 N. W. 742, where the bond insured a bank against loss happening through the dishonesty or through any act of omission or commission done or omitted in bad faith, a recovery was allowed for loss sustained by reason of an employee's cashing checks of a person, which had been drawn on other banks in which such person had no funds, the employee's act being after he had been instructed not to cash any checks of such person on outside banks unless he had the assurance of the banks on which they were drawn that they would honor them.

In *United States Fidelity & G. Co. v. Des Moines Nat. Bank* (1906) 74 C. C. A. 553, 145 Fed. 273, in an action on the bond of a cashier which provided that the company should not be liable for any loss occasioned by mistake, accident, error of judgment, or any robbery unless by or with the connivance or culpable negligence of the employee, and stated that culpable negligence should be taken to mean failure to exercise that degree of care and caution which
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men of ordinary prudence and intelligence usually exercise in regard to their own affairs, it was held error to instruct the jury that the degree of care, failure to exercise which would warrant a recovery, was the "very highest, you might also say the highest possible," "the very highest," and "an extraordinary and a very high degree;" the court holding that the terms of the contract were perfectly plain, and did not call for such an exercise of care as was specified in the instruction, but only ordinary prudence. The evidence in this case was held insufficient to show that a certain loss was sustained through the personal dishonesty or culpable negligence of a teller, where the testimony left it wholly a matter of conjecture as to which of several persons was responsible for the loss. J. T. W.

[ONTARIO APPELLATE DIVISION.]

FOSTER v. BROWN.

48 Ont. L. R. 1.

Adjoining owners — Lateral support — Liability of owner acquiring land after excavation — Subsidence due to lack of repair of retaining wall.

An owner of land is liable for damage occasioned by the subsidence of land of an adjoining owner which results because a retaining wall, built by defendant's predecessor in title after making an excavation extending to the boundary line, has been permitted to get out of repair.

(June 11, 1920.)

AN appeal by the plaintiff from the judgment of his Honor Judge Widdifield, one of the Junior Judges of the County Court of the County of York, dismissing the action as against the defendant Albert E. Brown.

The action was brought in the county court against Walter J. Brown and Albert E. Brown for damages for injuries to the plaintiff's land by excavating done by the defendants, or one of them, on land adjoining the plaintiff's, whereby the plaintiff's soil was deprived of lateral support and fell into the excavation.

The excavation was made by the defendant Walter J. Brown when owner of the land. The subsidence of the plaintiff's land occurred after Walter J. Brown had conveyed his land to the defendant Albert E. Brown.

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[2] The learned junior judge gave judgment for the plaintiff against the defendant Walter J. Brown for \$200 and costs, and dismissed the action as against the defendant Albert E. Brown.

The appeal was heard by Meredith, C.J.O., MacLaren, Magee, and Ferguson, JJ.A.

W. A. McMaster, for the appellant, submitted that judgment should go against the defendant Albert E. Brown. The latter was liable on the same principle as one who leaves a nuisance on his land is liable for consequential damage. *Broder v. Sail-lard* (1876) L. R. 2 Ch. Div. 692, 45 L. J. Ch. N. S. 414, 24 Week. Rep. 1011. Cases like *Greenwell v. Low Beechburh Coal Co.* [1897] 2 Q. B. 165, 66 L. J. Q. B. N. S. 643, 76 L. T. N. S. 759, and *Hall v. Duke of Norfolk* [1900] 2 Ch. 493, 69 L. J. Ch. N. S. 571, 64 J. P. 710, 48 Week. Rep. 565, 82 L. T. N. S. 836, 16 Times L. R. 443, 20 Mor. Min. Rep. 636, were against him, but he contended that there was a difference between sub-jacent and lateral support. He also asked that the amount of the damages should be increased.

J. M. Ferguson, for the defendant Albert E. Brown, respondent, denied that the nuisance principle could be appealed to, and asked, if that were so, on what principle could the respondent be held liable? The action was one in tort, and only the one who did the tortious act could be liable. The cases showed that the only duty cast upon the respondent was to keep the land as he found it. He relied upon the *Greenwell* and *Hall* cases, and also referred to Halsbury's Laws of England, vol. 11, p. 325, para. 635, and Am. & Eng. Encyc. of Law, 2d ed. vol. 18, p. 552.

Grayson Smith, for the defendant Walter J. Brown, respondent, said that he did not cross appeal, but appeared as a respondent to oppose any increase in the damages.

McMaster, in reply.

The judgment of the court was read by Meredith, C.J.O.: This is an appeal by the plaintiff from the judgment of the County Court of the County of York, dated the 9th February, 1920, which was directed to be entered by a junior judge of 10 B. R. C.

that court (Widdifield), after the trial before him without a jury on that day.

The respondent Albert E. Brown and the appellant are the owners of adjoining lots, and the action is brought to recover damages caused by the appellant's land having subsided and [3] fallen into an excavation dug by the defendant Walter J. Brown, the predecessor in title of the respondent Albert E. Brown, in his land, and extending to the boundary line between his land and the land of the appellant.

It was established by the evidence that, after the making of the excavation, a kind of retaining wall was built by the defendant Walter J. Brown for the purpose of providing support to the land of the appellant; it consisted of 1-inch planks supported by struts or braces. This retaining wall got out of repair and failed to answer the purpose for which it was built, and from time to time, as a result of this, a subsidence of the appellant's land occurred and the soil fell into the excavation. Owing to the condition of the wall, this occurred after the respondent became the owner of the land of Walter J. Brown.

On this state of facts, it is clear that someone is liable to the appellant for the damages he has sustained, and the question for decision is whether or not the respondent is liable.

The contention of the respondent, which was given effect to in the court below, is that a subsequent owner of land is not answerable for the consequences of an excavation, made in it by a previous owner, which has the effect of withdrawing from his neighbor's land the lateral support to which it is entitled, with the result that his land subsides and the soil falls away into the excavation.

In support of this contention two English cases were cited, *Greenwell v. Low Beechburn Coal Co.* [1897] 2 Q. B. 165, 66 L. J. Q. B. N. S. 643, 76 L. T. N. S. 759, decided by Mr. Justice Bruce, and *Hall v. Duke of Norfolk* [1900] 2 Ch. 493, 69 L. J. Ch. N. S. 571, 64 J. P. 710, 48 Week. Rep. 565, 82 L. T. N. S. 836, 16 Times L. R. 443, 20 Mor. Min. Rep. 636, decided by Mr. Justice Kekewich. These were cases in which the question arose between owners of the surface and persons engaged in mining operations, the surface and mineral rights being separated. 10 B. R. C.

rately owned. Subsidence had been occasioned by the working of the minerals by the predecessor in title of the defendants, but the injury for which damages were claimed had occurred while the defendants were in possession of the mines, they being in both cases tenants of the owners.

In the first case it was held that "a lessee of underground strata is not liable in damages to the owner of buildings on the surface, who has acquired a right to have the buildings uninjured by underground workings, for injury occasioned to the [4] buildings by reason of subsidence happening during the currency of the lease, caused, not by any act of commission on the part of the lessee, but resulting from an excavation made in the underground strata by the lessee's predecessor in title prior to the date of the lease." The view of Bruce, J., was that no duty rested on the defendant to prevent the subsidence, and that the maxim *sic utere* did not apply, because the defendants had done nothing to cause injury to their neighbors.

Kekewich, J., in the other case, followed this decision, and upon an independent consideration of the question came to the same conclusion as that reached by Bruce, J.

The only subsequent case in which either of these cases has been considered, that I have been able to find, is *Attorney-General v. Roe* [1915] 1 Ch. 235—a decision of Mr. Justice Sargant. He was there dealing with the case of an excavation immediately adjoining a highway, which was a source of danger and obstruction to persons using the road, and at p. 240 he distinguished between such cases as that and cases such as the *Greenwell Case*, saying:—

"Cases such as *Greenwell v. Low Beechburn Coal Co.*, which deal with the obligations between private owners when support has been removed by a predecessor in title, appear to stand on a somewhat different footing, and even there the question of liability was left open in cases where there might be a structure to be maintained."

I understand that what is referred to is the passage in the judgment of Bruce, J., at p. 179, where, referring to the duty which it was argued rested on the defendants, he said:—

"But I may observe that if in any case any such obligation
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were imposed upon them, such obligation could only arise in cases where it is proved to be practicable for the defendants by artificial support to have prevented the subsidence. In the present case there is nothing to show that that would have been possible."

Dealing with the same question, in *Gale on Easements*, 9th ed. p. 382, it is said:—

"On the other hand, questions of great difficulty will arise in the present state of the law in actions for subsidence caused by the acts of persons who have long ceased to be connected with the land."

[5] In *Halsbury's Laws of England*, vol. 11, para. 635, p. 325, it is said:—

"A lessee, and probably an owner in fee, of minerals or underground strata, is not liable to the owner of the surface who enjoys an easement of support in respect of his building for damage caused to such building during his possession, where such damage is the result of the removal of support by his predecessor."

It will be observed that this passage refers to an easement of support, and not to the right of support which is in question here, which is not an easement but a right incident to ownership, *ex jure naturæ*.

In a work on the law of support (Banks), which Mr. Justice Bruce speaks of as a valuable textbook on that law by a learned writer, the view is expressed that the person who is liable for the damages caused by subsidence is not the person "who originally created the state of things which caused the subsidence," but "who was *in possession* of the property in which that state of things existed at the time when the subsidence took place" (p. 5); and, contrary to the views of Bruce, J., he treats *Darley Main Colliery Co. v. Mitchell* (1886) L. R. 11 App. Cas. 127, 55 L. J. Q. B. N. S. 529, 54 L. T. N. S. 882, 51 J. P. 148, as a case in which that was decided to be the law.

If the rule laid down in the two cases to which I have referred is one of general application, and not subject to the qualification suggested by Mr. Justice Sargant, and they were well decided, the appeal must fail.

I shrink from holding that the law is as laid down in the two

cases to which I have referred, and I see no reason why, if a person who is in possession of land in which there is an excavation which is a source of danger to the public, although the excavation was not made by him but by a predecessor in title, is liable for the consequences of his permitting the dangerous condition to continue, the same rule should not be applied where a lateral support has been withdrawn by a predecessor in title, and the condition so caused has been permitted to remain and to cause injury to his neighbor, the owner of the land at the time the injury occurs should not be answerable for it. The consequences of holding otherwise would be that where a landowner had made an excavation in his land, and thereby removed the lateral support to which his neighbor [6] is entitled, but had built a solid retaining wall to prevent subsidence, which, during his ownership, prevented it, and had then sold his land to another and that other to others, and, owing to a subsequent owner—it might well be fifty years after—permitting the retaining wall to decay and no longer to answer the purpose for which it was constructed, with the result that his neighbor's land has subsided, he would be liable to answer in damages for the injury, and the man whose failure to keep up the retaining wall was the effective cause of the injury would go scot-free, and that too where the subsidence would not have occurred if the retaining wall had been kept in repair.

Such a result may well lead one to doubt the correctness of the decisions in the two cases to which I have referred.

In *Mitchell v. Darley Main Colliery Co.* (1884) L. R. 14 Q. B. Div. 125, the language of all the judges and their reasoning are, in my opinion, opposed to the view taken by Bruce, J., and Kekewich, J. I refer particularly to the following passage from the opinion of Bowen, L.J., at p. 138:—

“It seems to me that there has really been, not merely an original excavation or act done, but a continual withdrawal of support; that is to say, not merely an original act the results of which remain, but a state of things continued, and a state of things continued which has led to and caused the subsequent damage.”

And in that view Fry, L.J., expressed his concurrence.

It is true that in the case under consideration no question
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arose as to the liability of a subsequent owner; but, if the failure of the person who made the excavation to provide support in substitution for the coal which he had taken away was a continual withdrawal of support while that state of things existed, I am unable to understand why the failure of a subsequent owner to provide the necessary support, and *â fortiori* where he suffers a retaining wall to decay, is not equally a continual or continued withdrawal of support within the meaning of the expressions used by Lord Justice Bowen.

I am not impressed with the views expressed by Bruce, J., and Kekewich, J., as to *Darley Main Colliery Co. v. Mitchell*, which are directed mainly to show that Lord Blackburn in the Lords did not agree with the views expressed by Lord Justice Bowen, and not to a criticism of those views.

[7] Upon the whole, I have come to the conclusion that, in the circumstances of the case at bar, the respondent Albert E. Brown is liable for the damages which the appellant has sustained; and, if that conclusion is inconsistent with the decisions of Bruce, J., and Kekewich, J., I decline to follow them. In doing this I am fortified by the opinion of the judges of the Court of Appeal in *Mitchell v. Darley Main Colliery Co.*, to some extent at least by the opinion of Sargant, J., to which I have referred, and by the opinion of the text-writer whom I have quoted.

In addition to this, I find some support in what is said in *Gale on Easements*, to which reference has also been made.

It is to be regretted that the very important question which it has fallen to us to decide has arisen in an appeal from a county court, our decision of which is final.

I would allow the appeal with costs, and substitute for the judgment of the court below judgment for the appellant against the respondent for the damages assessed, with costs.

Since the foregoing was written, my brother Ferguson has called my attention to the statement of the case in *Corpus Juris*, vol. 1, p. 1221, which accords with my view and is as follows:—

“A subsequent purchaser of land is not liable for an injury to adjoining land resulting from the removal of the soil from his own land prior to the time at which he became the owner, and which he did not anticipate, except to the extent of the damages
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caused by his failure to take steps to prevent further injury after he became the owner."

The authority cited for this proposition is *Cavanaugh v. Thornton*, 11 Ky. L. Rep. 858.

Appeal allowed.

[The effect of the decision of the court is to set aside the judgment for the plaintiff against the defendant Walter J. Brown.]

Note.—Liability of subsequent owner of real property for injuries to adjoining property in consequence of excavation made by predecessor in title.

The question here under consideration cannot be said as yet to be definitely settled.

It will be observed that the court in the reported case (*FOSTER v. BROWN*, *ante*, 918) decided that one who became the owner of land before the subsidence of the land of an adjoining owner because a retaining wall, built by the defendants' predecessor in title to protect the adjoining land from an excavation extending to the boundary line, was permitted to get out of repair, was liable for the damage resulting from the subsidence. The reasoning of the court in the case is at least somewhat persuasive so far as it is applicable to a similar situation; that is, where the one who acquires the land allows a retaining wall erected by his predecessor to become out of repair, in consequence of which a subsidence follows on the adjoining property.

This decision finds some support in an abstract of the decision in *Cavanaugh v. Weber* (1890) 11 Ky. L. Rep. 858, where it is stated that one is not liable for an injury to his neighbor's lot, resulting from the removal of the soil from his own lot prior to the time when he became the owner, in which he did not participate, but that he may be responsible to the extent of the damages inflicted by his failure to take steps to prevent further injury after he purchased the lot.

The question of the liability of one operating mines for subsidences of the surface due to excavations made by his predecessor in title has been considered in several cases with the result that the courts have refused to hold the operator liable.

Thus in *Greenwell v. Low Beechburn Coal Co.* [1897] 2 Q. B. 165, it was held that a lessee of mining rights was not liable for subsidences happening while he was in possession, which were due solely to the excavations made by his predecessor in title before the date of the lease. The court said: "What act has been done which it was
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the duty of the defendants to take due care to prevent? The answer must be that they have not taken due care to prevent the subsidence. But what duty was there on their part to prevent the subsidence? They had taken no part in the excavation. The excavation was not wrongful. Until the damage ensued there was no cause of action,—no cause of complaint against anyone. How, then, did the duty arise by which it became incumbent on the defendants before the subsidence took place, to anticipate or prevent the subsidence? It is said that the defendants were bound so to use their land as not to injure their neighbors. So they were. But they have done nothing to cause injury to their neighbors; and, unless they are under an obligation to prevent the consequences of an act done by their predecessor in title, they have not been guilty of any omission of duty for which they can be rendered liable. It is suggested that the excavated strata left without any artificial support amounted to a nuisance; but I do not think they did. Until the actual subsidence happened there was nothing unlawful in the state in which the land was left. At no moment prior to the subsidence can it be said that there was any duty upon anyone to provide artificial support; and, therefore, it seems to me that it cannot be said that the defendants are guilty of a default of duty in allowing a state of things to continue which was a perfectly lawful state of things."

The decision in *Greenwell v. Low Beechburn Coal Co. supra*, was followed in *Hall v. Norfolk* [1900] 2 Ch. 493, 69 L. J. Ch. N. S. 571, 64 J. P. 710, 48 Week. Rep. 565, 82 L. T. N. S. 836, 16 Times L. R. 443, 20 Mor. Min. Rep. 636, where it was held that a devisee of the owner of mineral lands was not liable for a subsidence of neighboring land which was due to excavations by the deviser.

And following the decision in *Greenwell v. Low Beechburn Coal Co. supra*, in *Stellarton v. Acadia Coal Co.* (1898) 31 N. S. 261, it was held that a coal mining company was not liable for damages caused by a subsidence of the surface occurring during its occupation which resulted from an excavation made by a previous occupier.

In *Darley Main Colliery Co. v. Mitchell* (1886) L. R. 11 App. Cas. 127, 55 L. J. Q. B. N. S. 529, 54 L. T. N. S. 882, 51 J. P. 148, the question was as to the liability of lessees of coal mining rights, who had paid for damage due to subsidence caused by a removal of coal, for damage resulting subsequently from a further subsidence, which would not have occurred if an adjoining owner had not worked his coal land, and the question of liability of a subsequent owner or lessee was not involved. The right to recover was sustained by a majority of the court. Blackburn, J., however, dissented, and, in refusing to take the view that there was a continual withdrawing of support, said that one consequence of doing so would be that where the owner in fee of a seam of coal worked it out, and died leav-

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ing it in this state, the heir of the land in which the worked-out seam lay would be liable to an action for continuing a nuisance, and he stated that surely the facts could not be such as would produce that effect.

And in *Secongost v. Missouri P. R. Co.* (1893) 53 Mo. App. 369, it was held that a complaint which did not show that the defendant had done the digging away, although it was in possession of the excavated property during the time when the plaintiff's adjoining land fell in, by reason of the excavating, did not set out a cause of action; the court stating that it was the digging away of the soil so near to the plaintiff's property as to cause it to fall in that made up the wrong committed, and for which damages in such cases were allowed.

In *Lyons v. Walsh* (1917) 92 Conn. 18, L.R.A.1917F, 680, 101 Atl. 488, where a former owner of land when excavating removed a part of adjoining land and erected a solid stone wall entirely on such adjoining land to support it, it was held that the wall became a part of the land on which it was erected, and that no burden attached to the other parcel with respect thereto, and that as between subsequent purchasers of the different parcels the duty to maintain the wall rested on the one owning the land on which it was situated, and not upon the one who had acquired the land formerly belonging to the one who built the wall. The court said: "When a former owner of the Lyons's land first disturbed its surface, he did so at the peril of answering in damages if his act should destroy the lateral support which was his neighbor's by natural right. The law as to that situation is universally settled: 'The right of an owner of land to the support of the land adjoining is *jure naturæ*, like the right in a flowing stream. Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition.' *Gilmore v. Driscoll* (1877) 122 Mass. 201, 23 Am. Rep. 312, 14 Mor. Min. Rep. 37; *Trowbridge v. True* (1884) 52 Conn. 190, 52 Am. Rep. 579; *Ceffarelli v. Landino* (1909) 82 Conn. 126, 72 Atl. 564. He apparently recognized this, and sought to forestall the probable result to the higher ground of the upper lot by substituting an artificial support to safeguard it. In every effective sense he accomplished this purpose, but what he actually did was to take away a portion of his neighbor's land and replace it with a solid stone wall. Whether he invaded the adjoining lot by mistake or with its owner's consent is of no consequence, so far as his successors in title are concerned. It was in any event so done as to leave no charge upon his own land. The wall became as much a part of the realty upon which it was built as the earth had been which it replaced, and with the same incidents and burdens of ownership as attach to every part of the land on which it stands. . . . The accepted law with
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relation to lateral support is therefore without direct significance here, and of only an incidental interest in its possible bearing upon the equities which the case discloses. Such right arising from it as the defendant's predecessors in title had in relation to the adjoining land was by way of relief in damages, once a wrongful invasion had been followed by an actual injury to the land. There is, of course, no natural right to equitable interference for the prevention of such an anticipated wrong,—though it may very well be that in cases presenting situations peculiar to themselves and disclosing the essential elements of irreparable injury a court of equity will interpose its aid. But the redress contemplated by the law is that which comes from an infringement of the right that works actual damage. The violator is then answerable for his tort, whether he be the owner of the premises on which the initial mischief is committed, or the merest stranger to the title. . . . The action is a purely personal one. The wrong which gives rise to it binds the land to nothing, charges the title with nothing. But if the owner, in anticipation of such an injury arising out of his acts, sets an artificial structure on his own land to prevent it, and to replace what he has removed, he assumes an obligation which equity will recognize, and charges the land with its maintenance—so far, at least, as that maintenance is necessary to preserve his neighbor's rights. The defendant seems to assume that in some way the situation presented here is controlled by this principle, and relies chiefly upon the earnestly urged unfairness of saddling the maintenance of the wall upon her, when it was confessedly erected by a former owner of the adjoining land to protect what later became hers from the consequences of his invasion. However persuasive her statement of the equities may appear in this limited view of the situation, the claim is not tenable. It ignores the entire absence of the link vitally necessary here to fasten any liability upon the plaintiff,—a burden upon the land itself which attaches to her as its owner. She is obviously only reachable through this, and it is not even seriously suggested that under the positive and well-understood law of real property the land came to her charged with any duty to this wall. As to any supposable personal agreement by the builders of the wall to maintain it—if we were at liberty on the record before us to assume that such an agreement ever existed—there is no conceivable theory of law or equity which could transfer the obligations of such a personal undertaking to the plaintiff upon her mere acquirement of a title in no way affected by it. But, while these considerations are decisive of the case, it is apparent that something might be said for the plaintiff's equitable position here,—if there were occasion to treat the matter in that aspect. She succeeded to her present ownership as recently as 1913, and took the land as she found it. The wall was no part of her

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purchase, but was an open and visible part of the adjoining property. We may properly assume from the facts found that it was then in an advancing condition of decay. Whatever the original purpose of its erection had been, it became, after her ownership began, a source of annoyance, if not a menace, to her occupation. Even had she taken title with knowledge that the structure had been voluntarily put there by some former owner of the land she was buying, to avoid a personal liability for a tort of his own, this could not weaken her position from the standpoint of equity. She was in no sense equitably, any more than legally, answerable for any act of her predecessor in title, to which she was not a party, and which did not result in a charge upon the land. We are unable to sustain the judgment of the trial court, charging the plaintiff, as it does, with the duty of maintaining the wall, but the finding is comprehensive enough to warrant a final disposition of the case without a retrial."

J. T. W.

[ENGLISH COURT OF APPEAL.]

DAVIES v. THOMAS.

[1920] 2 Ch. 189.

Also reported in [1920] W. N. 181, 36 Times L. R. 571, 64 Sol. Jo. 529.

Master and servant — Interference with employment — Liability.

Members of an association of traders in a particular district, having a rule which provided that "on an employee leaving an employer who is a member of the association, the employer shall (if so desirous) report the same to the secretary, who shall advise all the members, and no other member of the association shall employ or supply him for twelve months," are not liable for persuading a member of the association, no coercion, threats, or improper pressure being employed, lawfully to terminate his employment of the plaintiff, who had previously been employed by another member of the association, and who, as he had a right to do, was soliciting business from his former employer's customers.

— When persuasion may be an unlawful means.

From the fact that persuasion is employed by more persons than one acting in concert, pressure may be inferred which it would be impossible to infer from the act of one person by himself. Per Warrington, L.J., at page 201.

Restraint of trade — Rule of trade association restricting employment of former employees of members.

A rule of a trade association providing that on an employee leaving the employment of a member the employer may, if he so desires, report

the same to the secretary, who shall advise all the members, and that no member of the association shall employ or supply such former employee for twelve months, although void as in unreasonable restraint of trade, does not amount to an actionable conspiracy where it has no coercive effect.

Decision of P. O. Lawrence, J. [1920] 1 Ch. 217, affirmed.

(April 30, 1920.)

APPEAL from a decision of P. O. Lawrence, J. [1920] 1 Ch. 217, dismissing an action in which the plaintiff claimed an injunction to restrain the defendant from interfering with him in the exercise of his calling of a traveler in the yeast trade.

The facts are fully stated in the report in the court below.

Schwabe, K.C., and Roope Reeve, for the appellant. Where a body of employers combine with the object of inducing by pressure one of their number to discharge an employee, and so to interfere with his carrying on his occupation as he will, that is an actionable wrong. Rule 20 of this association is admittedly void, as being in restraint of trade. *Mineral Water Bottle, etc., Society v. Booth* (1887) L. R. 36 Ch. Div. 465, 57 L. T. N. S. 573, 36 Week. Rep. 274. The inference from [190] the facts in this case is that the members of the association agreed together to prevent any ex-employee of a member from earning his living in this trade if his former employer requested that it should be done. If an employee left his employer and set up in business for himself, under rule 20 no member was to supply him with goods, or if he entered the employment of another he was to be discharged. Such an arrangement as that is clearly illegal and actionable if damage ensues. It is true there was no threat to Hopkins. There is no express power to expel from the association, but the members could make themselves exceedingly disagreeable to anyone refusing to adhere to the rules.

[**Lord Sterndale, M.R.**: Has the learned judge found that there was any intention on the part of the members to injure Hopkins in his business if he did not obey the rule?]

No; but the meeting was called to enforce rule 20, and pressure was brought to bear on Hopkins.

[**Warrington, L.J.**: The learned judge has found that no
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illegal means were used and that the act induced was not illegal.]

It is submitted that a combination of persons to interfere with the plaintiff's liberty to earn his living in his own way is *prima facie* unlawful.

[Younger, L.J.: If three persons mutually agree that each of them will, if so required by the other two, give notice to his employee to terminate his engagement, and that neither of the other two will employ him, would that give the employee any right of action?]

It is submitted that it would. There is a recognized right for a man to dispose of his labor as he pleases without obstruction or interference by others. The question is, what interference with that right is actionable.

(1) An inducement not to employ brought about by violence or threats is clearly actionable.

(2) An inducement, without threats, to break a contract, is also actionable if there be no just cause for the inducing.

(3) Where there is no threat or violence and no contract broken, there may be a question whether there is any right [191] of action in such a case. See per Lord Loreburn, L.C., in *Conway v. Wade* [1909] A. C. 506, 510, 78 L. J. K. B. N. S. 1025, 101 L. T. N. S. 248, 25 Times L. R. 779, 53 Sol. Jo. 754.

If there is an oppressive combination necessarily resulting in injury (excluding intention or motive) by inducing persons not to deal with another, without the excuse that the inducers are merely exercising their own correlative rights, that is actionable. *Valentine v. Hyde* [1919] 2 Ch. 129, 138, 88 L. J. Ch. N. S. 326, 120 L. T. N. S. 653, 35 Times L. R. 301, 63 Sol. Jo. 390.

[Younger, L.J.: You say that there is a conspiracy to make effective a restrictive covenant which could not be enforced by any of the parties to it.]

Yes, that is the submission. A combination of two or more, without justification or excuse, to injure a man in his calling, is actionable if damage results. *Quinn v. Leathem* [1901] A. C. 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66. That was the converse case of a combination of workmen to injure an employer.

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In *Mogul Steamship Co. v. McGregor, Gow & Co.* [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101, it was held that the plaintiffs had no cause of action because the acts of the defendants were done with the lawful object of protecting and extending their trade. But see *Larkin v. Long* [1915] A. C. 814, 843, [1915] W. N. 191, 84 L. J. P. C. N. S. 201, 113 L. T. N. S. 337, 31 Times L. R. 405, 59 Sol. Jo. 455, 49 Ir. L. T. 121, Ann. Cas. 1915D, 509; *Giblan v. National Amalgamated Labourers' Union* [1903] 2 K. B. 600, 1 B. R. C. 528, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708.

What is justification in a case like this? The learned judge relied upon the fact that rule 20 was inserted in the rules with the sole object of benefiting the members of the association in their respective businesses. But that has been held not to be the law. *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A. C. 239, 244, 246, 1 B. R. C. 1, 74 L. J. K. B. N. S. 525, 53 Week. Rep. 593, 92 L. T. N. S. 710, 21 Times L. R. 441, 2 Ann. Cas. 436. The supposed interest of the inducers is not sufficient justification. *Larkin v. Long*, *supra*.

An accurate summary of the law is given by McCardie, J., in *Pratt v. British Medical Association* [1919] 1 K. B. 244, 265, 9 B. R. C. 982, 88 L. J. K. B. N. S. 628, 120 L. T. N. S. 41, 35 Times L. R. 14, 63 Sol. Jo. 84.

There is no distinction between claims for inducing persons to break contracts already entered into with the plaintiff, and for inducing persons not to enter into contracts with the plaintiff. Both are maintainable in law. *Temperton v. Russell* [1893] 1 Q. B. 715, 728, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676. The principle running through the boycotting [192] cases is the same as that which governs the cases on enforcing covenants in restraint of trade. *Morris v. Saxelby* [1916] 1 A. C. 688, 85 L. J. Ch. N. S. 210, 114 L. T. N. S. 618, 32 Times L. R. 297, 60 Sol. Jo. 305, Ann. Cas. 1916D, 537.

Rule 20 in this case resembles the rule in *Mineral Water Bottle, etc., Society v. Booth* (1887) L. R. 36 Ch. Div. 465, 57 L. T. N. S. 573, 36 Week. Rep. 274. The reason why the agreement was held to be void in that case was that it was contrary to 10 B. R. C.

public policy, which does not allow a man to be prevented from carrying on his lawful avocation. The gist of this case is that there was an unlawful conspiracy in pursuance of a void rule to prevent the plaintiff from carrying on his calling. See per Lord Brampton in *Quinn v. Leathem* [1901] A. C. 495, 525, 526, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66.

To procure from others an agreement not to employ a particular man or to discharge him is equivalent to industrial murder of the man, and is void as against public policy. If two or more agree to do it there is a conspiracy to destroy the man's legal right to employ his labor as he likes. *Read v. Friendly Society of Operative Stonemasons* [1902] 2 K. B. 732, 1 B. R. C. 503, 71 L. J. K. B. N. S. 994, 51 Week. Rep. 115, 87 L. T. N. S. 493, 19 Times L. R. 20, 66 J. P. 822; *Conway v. Wade* [1909] A. C. 506, 78 L. J. K. B. N. S. 1025, 101 L. T. N. S. 248, 25 Times L. R. 779, 53 Sol. Jo. 754.

[Lord Sterndale, M.R., referred to *Scottish Co-operative Society v. Glasgow Fleshers' Association* (1898) 35 Scot. L. R. 645, 5 Scot. L. T. 263.]

McCardie, J., said in *Pratt's Case* [1919] 1 K. B. 244, 264, 9 B. R. C. 982, 88 L. J. K. B. N. S. 628, 120 L. T. N. S. 41, 35 Times L. R. 14, 63 Sol. Jo. 84, that that rested on the same footing as the *Mogul Case*.

The judgment of the learned judge in this case is misconceived, (1) because he omits altogether to deal with the proposition that it is an actionable wrong to interfere with the right of another person to carry on his calling as he will; and (2) because he holds that the supposed interest of the inducers is sufficient justification for the acts complained of.

Jenkins, K.C., and C. Lyttelton Chubb, for the respondents, were not called upon.

Lord Sterndale, M.R.: This is an appeal from P. O. Lawrence, J., in an action brought by the plaintiff Mr. Davies, against four defendants,—William Thomas, Jonah Reynolds, William Rice, and Thomas David Williams. The facts are stated very accurately in the report in the court below ([1920] 1 Ch. 10 B. R. C.

217,) [193] and I do not propose to repeat them at any great length. It is an action to restrain the defendants "from interfering in any manner howsoever with any person or persons, company, or corporation, with a view to causing such person or persons, company, or corporation to break his or their contract or contracts with the plaintiff, or to cease to employ or supply him, or to abstain from entering into contracts with him." The facts, so far as I think it necessary to state them, are these: The plaintiff entered into the employment of the last-named defendant, Mr. Williams, as a traveler or agent in Mr. Williams's business, which was that of a yeast dealer. There was some discussion about a restrictive covenant being inserted in his agreement, binding him not to compete in various ways mentioned in the clause, but although the plaintiff signed it he never sent the signed agreement to the defendant, and it is admitted that the employment continued upon the footing of there being no restrictive agreement at all. The plaintiff and all the defendants were also yeast dealers, and they were members of a certain association called the West & Mid-Wales Yeast Dealers' Association, which had primarily for its object the protection of the members of the association. The rules of the association contained a rule to which I shall have to refer later. Mr. Hopkins, who is not a party to the action, was also a member of the association. Before the plaintiff left the defendant's employment, there had been communications between the plaintiff and Mr. Hopkins with the view of effecting an agreement between them by which the plaintiff would enter into Hopkins's employment, and he eventually did so. He had not, I think, been in the yeast business before he entered the service of the defendant, but during his service he established a considerable connection, and the object of the plaintiff in going to Mr. Hopkins was that he should take with him a considerable part of that connection. In fact, to do him justice, the plaintiff does not in the least deny that. He says that while discussing this arrangement with Mr. Hopkins he mentioned the business he had been doing for the defendant, and he said he thought that Mr. Hopkins regarded [194] that connection as being a matter which might be valuable to him, Mr. Hopkins. He was asked this:

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"At any rate, you had the intention, you yourself, of canvassing the customers whom I may call the customers you got for Mr. Williams? (A) I intended to canvass anybody and everybody, and that is what I actually did. (Q.) And you used your own connection for all it was worth, did you not? (A.) I used it for the first fortnight for all that I was worth, and then when this friction started . . ."—that was the friction with Mr. Hopkins, because he had engaged the plaintiff—"when the friction started . . ." then the answer stops. But there is no doubt he meant to go on and say, "when the friction started, I ceased doing so." Then he is asked whether there were certain customers at Briton Ferry, whom, he said, he did not obtain for Mr. Williams and a share of whose business he admitted he took over to Mr. Hopkins. I do not think it is necessary to state any more than that. The plaintiff was doing what it was his legal right to do. There was no restrictive covenant in his agreement with Mr. Williams, and therefore he was justified in taking his connection over to Mr. Hopkins if he wished. Whether it was a fair thing to do, I express no opinion upon at all; but it is obviously a thing which Mr. Williams might object to. When I say "object to," I do not mean legally, but he might resent. It is equally clear that if it became a practice amongst the employees in the trade, it would be a thing to which all the people in the trade and all the members of the association might take exception, and they did take exception. Mr. Williams, seeing the plaintiff canvassing for Mr. Hopkins, wrote him a letter in which he called what he was doing "a dirty action," "anything but straightforward and honorable;" and he wrote two or three days afterwards to Mr. Hopkins, asking him to give immediate notice to terminate the plaintiff's engagement, and saying that if he did not do so he, Williams, would bring the matter before the association. Mr. Hopkins refused to give that notice, and thereupon the defendant Williams issued a notice convening an emergency meeting of the association, and put upon the notice this agenda: "To [195] consider a reduction in the price of yeast and the necessity of members complying with rules 18 to 20." Rules 18 and 19 had nothing to do with this case, but 20 is the rule to which I have already referred and which I have now to read; it is this: "On an employee leav-

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ing an employer who is a member of the association, the employer shall, if so desirous, report the same to the secretary, who shall advise all the members, and no other member of the association shall employ or supply him for twelve months." That is a rule which, according to the *Mineral Water Bottle, etc., Society v. Booth* (1887) L. R. 36 Ch. Div. 465, 57 L. T. N. S. 573, 36 Week. Rep. 274, would be void, as being contrary to public policy. The meeting took place, and there was an animated discussion between Mr. Hopkins on the one side and the defendant Williams, and other members of the association on the other, and many members expressed their opinion that Mr. Hopkins had done a dirty action in engaging the plaintiff, and pressed him to put an end to the engagement, and to give notice, as he was entitled to do, to the plaintiff. When I say "pressed him," I mean, pressed him without any coercion or threat, but urged him to do so. He refused. The consequence was that they carried a resolution that a small committee should be formed to get the question in dispute between Mr. Hopkins and Mr. Williams settled, and three members who were present were chosen to act as the committee, the defendant Thomas, who was, I think, the chairman, or, at any rate, an official of the association, being one, but none of the other defendants being upon the committee. That committee never met and never acted, for this reason, that after the committee had been appointed, the members all went to tea and the matter was again discussed, but no conclusion was arrived at. After tea most of the members, including all the defendants except Mr. Williams, that is, the defendants, Thomas, Reynolds, and Rice, left, but the discussion was continued by the remaining members, and ultimately Mr. Hopkins promised to give the plaintiff a month's notice to terminate his engagement. The notice was given, and, according to the learned judge, caused the [196] plaintiff damage to the extent of 25*l*. The learned judge accepted the evidence of Mr. Williams as to what took place at the meeting, and after the meeting, and what took place up to the time when Mr. Hopkins consented to give notice to the plaintiff, and as he accepted that evidence, I think I am justified in treating it as a true account of what took place. [The Master of the Rolls then referred to the evidence and continued:] On that, the learned
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judge finds this: That there was no threat and no coercion employed at all. Of course, at the time when Hopkins consented to give the notice, the three defendants, other than Williams, were not present at all, but the plaintiff's case is that the pressure had been exercised at the meeting, and that the pressure which was exercised lasted until the agreement to give the notice was arrived at. He doubts very much, upon the evidence, whether there was any evidence at all against the defendants, other than Williams. I rather share that doubt. But he has found, as I say, that there was no pressure, no threat, and no attempt at coercion. I have not the slightest doubt that it was present to the learned judge's mind, just as much as it must be to everybody's, that you may have threats and coercion and pressure without any actual threats or intention to exercise coercion being put into words, and I have no doubt he considered that and considered all the circumstances before he arrived at his conclusion of fact. Mr. Hopkins was not called. Therefore, the only evidence of what took place at the meeting was the evidence of Mr. Williams, accepted by the learned judge, and I do not see my way to differ from his finding on the evidence that there was no coercion and no attempt at coercion or pressure on the part of any of these defendants. There may be said to have been evidence both ways in this sense, that it was contended that the position which the defendants occupy, some of them as officials, and all of them as members of the association, was such as of itself would constitute their acts coercion. The learned judge has considered that, and has come to the conclusion that in the circumstances it did not, and I must accept that finding also.

Now the question we have to decide is whether, upon those [197] facts, the plaintiff has established a cause of action. That being the nature of the action, we have been taken through all the cases and all the discussions on *Allen v. Flood* [1898] A. C. 1, 96, 62 J. P. 595, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 14 Times L. R. 125, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285; *Quinn v. Leathem* [1901] A. C. 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66; *Conway v. Wade* [1909] A. C. 506, 78 L. J. K. B. N. S. 1025, 101 L. T. N. S. 10 B. R. C.

248, 25 Times L. R. 779, 53 Sol. Jo. 754, and all the others that have any bearing upon this matter. If I do not discuss those authorities at length it is not from any disrespect to the argument that has been addressed to us, but because I think that this case depends upon its own facts, and it does not require any statement of all the principles that may govern a variety of actions of this kind. With regard to an individual, in cases of this kind, they are stated by Lord Watson in *Allen v. Flood*, *supra*, in a passage which has been several times referred to, in these words: "There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor,"—that is the instance which applies to this case. Hopkins was entirely within his legal rights in giving notice to the plaintiff,—“and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley v. Gye* (1853) 2 El. & Bl. 216, 232, 118 Eng. Reprint, 749, 22 L. J. Q. B. N. S. 463, 17 Jur. 827, 1 Week. Rep. 432, 1 Eng. Rul. Cas. 706, the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party.” That states that the mere inducement to break a contract is in itself actionable. The inducement not to employ is actionable only if it proceeds by illegal means, and the illegal means generally used in these cases is pressure, coercion for the purpose of injuring the third person referred to in that statement. I do not think that the principle differs in the case of the inducement being effected or procured by a number of persons except to this extent, that it is much easier to infer pressure or coercion in the case of a number of persons, especially if they are in [198] a position to make themselves objectionable if their request is not complied with, than it is in the case of a single person. I think this is shown in the first place by *Mogul Steamship Co. v. McGregor, Gow & Co.* [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. 10 B. R. C.

Cas. 120, 56 J. P. 101, and also by *Scottish Co-operative Society v. Glasgow Fleshers' Association* (1898) 35 Scot. L. R. 645, 5 Scot. L. T. 263, referred to by Lord Lindley in *Quinn v. Leatham* [1901] A. C. 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 27 Eng. Rul. Cas. 66. Those were cases of competition, and competition was held to be a perfectly legal means of interfering with another person's business. This, of course, is not a case of competition, but I think those cases show that the principle that in a case of this kind the means used must be illegal applies as much to an inducement by a number of persons as to an inducement by one.

A very wide proposition indeed was contended for by the appellant in this case, a proposition which, I think, may be put in these words, that where you have a number of persons combined, any act done by them in combination to induce one person not to deal with another, or not to employ another, is actionable. I do not assent to that proposition, and I think it is contrary to the principles that are laid down in all the cases to which we have been referred. Therefore, I think we have really to examine here whether any illegal means were in fact used by these persons.

It was argued that we must say so for this reason, that, this rule being contrary to public policy and therefore bad, these persons who purported to act upon it were entering into an illegal and wrongful conspiracy, because they were combining to carry out something which was contrary to public policy, to the injury of another. I do not think myself that upon the facts as found by the learned judge such a case arises. It is for that reason that I do not go into the authorities at any length. There was no evidence, so far as I can see, when Mr. Hopkins was asked and persuaded to give notice to the plaintiff, that all the members would abide by the rule and nobody would employ him. There was not even an attempt to induce Mr. Hopkins to give him notice in any event. What he was asked to do was to give him notice unless [199] he was prepared to give up employing the plaintiff for the purpose of canvassing the defendant's customers. If he did that, there was no objection to his continuing to employ the plaintiff. Therefore, I do not think that that general question arises; and as
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the learned judge has found that there was no coercion, no threat, either express or implied, no improper pressure, and nothing really but a request and persuasion, and no illegal means were employed, the plaintiff has not established his cause of action. My judgment proceeds entirely upon the facts of this particular case, as found by the learned judge and as disclosed in the evidence.

I think, therefore, this appeal fails and must be dismissed, with costs.

Warrington, L.J.: I am of the same opinion. The facts found by the learned judge, and it is on those facts that I think this case must be decided, resolve themselves into this: The plaintiff, Davies, was, on March 6, 1919, in the employ of a man named Hopkins, subject to a month's notice to determine his employment. Davies had until a week or two before Hopkins engaged him been in the employment of the defendant Williams. He occupied with Hopkins the same capacity as that which he occupied with Williams; namely, that of canvasser for orders for goods sold by them respectively, which were the same class of goods. He had quite lawfully taken to Hopkins and away from Williams a certain amount of the business which he had previously procured for Williams, so that Williams's business had been hampered and injured by the fact that his servant, Davies, had gone over to Hopkins, as his rival in trade. Under these circumstances on March 6, 1919, Williams and certain other persons who are not parties to the action succeeded in persuading Hopkins to yield to their representations and to give a month's notice to Davies terminating his employment. Davies then brought this action against the defendant Williams and three other persons, not those whose representations had the success to which I have referred, but certain other persons, alleging that Williams and those [200] persons, who are made defendants, had, by means of improper pressure, interfered with Davies's means of obtaining a livelihood, by obtaining his dismissal from Hopkins's employment. Williams, and the three persons who succeeded with him in persuading Hopkins to take the course he did, so succeeded, as the learned judge has found, using no threats, no coercion, no im-

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proper pressure or other illegal means, and the learned judge has therefore found that that being so, Williams, who is the only one of those persons sued by the plaintiff, is not liable to the plaintiff for any damage which has been occasioned to him by what was done. Now is that right or not?

Before I come to examine the law which, for this purpose, I think, is quite settled, I would just point out this: These other defendants were sued by the plaintiff and are still defendants in the action and respondents to the present appeal; a man named Thomas, another named Reynolds, and a third named Rice. They held respectively the positions of chairman, vice chairman, and treasurer of a certain association of traders to which I shall have to refer presently, and it is alleged against them also that they, by the use of improper means, induced Hopkins to dismiss Davies. The fact with regard to them is that they did no such thing. They attempted also by representations without threats, without coercion, without using any illegal means, to induce Hopkins to dismiss Davies, but they did not succeed. To their representations Hopkins returned a positive refusal, and therefore, in any case, there could be no possible cause of action against these persons, because all that they did was devoid of success, and they never in fact injured the plaintiff.

The law applicable to this case is laid down in plain terms and with extreme simplicity in the speech of Lord Watson in the famous case of *Allen v. Flood* [1898] A. C. 96, 62 J. P. 595, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 14 Times L. R. 125, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285. [The Lord Justice read the passage cited above by Lord Sterndale, M.R., and continued:] Applying that to the present case, the act which Williams and the other persons procured to be done was not an illegal act; it was an act within the contractual rights [201] of Hopkins, because Davies was in his employment, subject to a month's notice, and he gave him a month's notice. Then it cannot come within the first branch, as stated by Lord Watson. If it is to be brought within the second branch then it is incumbent upon the plaintiff to show that the act in question, not being itself illegal, has been brought about by the use of illegal means. The learned judge has found in terms that no illegal means were

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used. Therefore it does not come within the second branch of the rule, as stated by Lord Watson. But I have so far omitted from consideration one fact; namely, that the persuasion and the representations were employed and made not by one person only, but by two or more acting in concert. Does that make any difference? In my opinion it does not. If I see that a man is employing a person under circumstances which make it, in my opinion not quite fair or right that he should be employing him, am I committing an illegal act because I get a man who also holds the same opinions to go with me and we together represent to the employer that he is not doing what he ought to do? I think that can only be answered in one way. It seems to me, therefore, on the facts, as I have stated them, which I think are in substance as found by the learned judge, that the plaintiff could have no right of action against these defendants. But I must not dismiss it quite so shortly as that. It may be that, if a great number of persons are engaged in the transaction, from that fact you may be able to infer pressure, and conscious pressure or unconscious influence, which it would be impossible to infer from the act of one person by himself. I do not deny that that may be so, and, in that sense, the fact that the inducements are used by more persons than one may become a material element, but it is excluded in the present case, because the learned judge has found on the facts that there was no undue pressure or undue influence of any sort. Therefore, in this case at any rate, the fact that the persuasion was used by several people acting together is immaterial. But then it is suggested that what was done was in pursuance of an unlawful conspiracy because the [202] parties in question were all members of the association, the rules of which include a rule to this effect: "On an employee leaving an employer who is a member of the association, the employer shall, if desirous, report the same to the secretary, who shall advise all the members, and no other member of the association shall employ or supply him for twelve months."

I do not comment on the English of that rule, though a good deal might be said about it, but I think the fair result of it is that the members agree that an employee who leaves a member of

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the association is not to be employed by another member for a period of twelve months. Now what is said is that that is an agreement which could not be enforced, because it is contrary to public policy, and that because it is contrary to public policy, it is in itself evidence of an unlawful conspiracy. I confess I cannot follow that. "Unlawful conspiracy" was defined by Willes, J., in *Mulcahy v. The Queen* (1868) L. R. 3 H. L. 306, 317, in this way: "Conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." That is to say, to be a conspiracy,—that is, an unlawful conspiracy, one which gives rise to either an indictment or a right of action,—it must have an unlawful object, that is, the act which it is intended to bring about must be in itself unlawful, or, if not in itself unlawful, then it must be brought about by unlawful means. Neither of those two essentials is to be found in the agreement contained in this rule. The object which was to be brought about was that which it was lawful for any member of it to do, that is to say, to employ or not to employ a particular person. There were no means of enforcing it provided by the rule; there was no sanction; and the mere fact that if an action had been brought on this rule it could be held void as being in restraint of trade does not in itself, in my opinion, make it an unlawful rule in the sense of making those who are parties to it parties to an unlawful conspiracy. It has been decided over and over again that if I enter into a contract which is not enforceable, which is void as being in [203] restraint of trade, I am committing no offense, I am merely promising to do that which I cannot be compelled to do, because it is, from the point of view of public interests, an undue restraint on my freedom of action. It is nothing more than that. The fact is that in the present case the rule is material only as affording a possible source from which undue pressure or undue influence might flow, but then the learned judge again, as I have pointed out, has found there was no undue pressure and no undue influence. That being so, I can only come to this conclusion, that the facts of the present case do not bring it within any of the principles which are stated in a large variety of forms in the very
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numerous cases which have been cited to us, and that the judgment of the learned judge in the defendant's favor is, therefore, correct, and the appeal must be dismissed.

Younger, L.J.: I am of the same opinion. I arrive at that conclusion solely upon a consideration of the actual facts of this case. I can state my reasons, I think, very shortly. Hopkins's business at Neath was carried on in direct competition with that of Williams in that town where the plaintiff had been employed. There can, I think, be no question that if the plaintiff in his agreement with Williams had submitted to a restriction which would have precluded him from entering into or remaining in the service of Hopkins, that restriction would have been perfectly good. No principle of public policy would have been infringed by its having been entered into. It would have been a restriction which was not more than reasonably necessary for the protection of Williams's connection, and if it had been contained in an agreement which had been broken by Davies, an injunction at the instance of Williams would have been a matter of course.

A restrictive covenant in terms wider than those which I have suggested was originally contemplated as a covenant to be inserted in the agreement between the plaintiff and Williams, and that it did not find a place in that agreement was not due to any reluctance on the part of the plaintiff to have it inserted. It is noticeable, also that in the agreement [204] into which the plaintiff did enter with Hopkins, a restrictive covenant, not so far as I can see in any sense too wide, but wider than that which I have indicated, does in fact find a place. It is true, as I have said, that there is no such restrictive covenant in fact in the agreement that was concluded between the plaintiff and Williams, but I cannot, on any principle, see what objection can at the instance of the plaintiff be suggested to any arrangement that might be entered into between Hopkins and Williams that Hopkins should give effect to that perfectly fair provision. Again, if Hopkins were so to agree, there would be no principle of public policy involved, nor, so far as I can see, would any right of the plaintiff properly so called be infringed. There was something in the nature of an arrangement come to between Williams and certain
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other people, and Hopkins, the effect of which was that Hopkins did give notice to the plaintiff, determining in due course the agreement which he, the plaintiff, had entered into with Hopkins, and it is of that notice that the plaintiff complains in this action.

I have said that I myself can see no objection on principle to such an arrangement being entered into between Williams and Hopkins. Equally I can see no objection to other persons associating themselves in bringing about that arrangement, if those persons were, as they were, persons connected with the industry in which both Williams and Hopkins were engaged, and in that character bringing before Hopkins such arguments as occurred to them to prompt him to take the course of giving notice to the plaintiff. It is, as I have said, of that notice the plaintiff complains, and it is in respect of the action of Mr. Williams and those other persons in relation to it that he seeks to recover damages. It is not a case in which these defendants by any unlawful means have induced Hopkins to give that notice, nor is it, on the finding of the learned judge, even a case where the defendants, by improper considerations, bribery or otherwise, have induced Hopkins to take that course. It is merely a case where the defendants, acting as they conceived in their joint interests, placed, as the learned judge has found, [205] before Hopkins arguments and considerations which led him to give to the plaintiff a notice which so far as any contract with the plaintiff was concerned he had a perfect right to give.

In my judgment no illegal means were adopted to induce Hopkins to give that notice, nor was any illegal result achieved. Accordingly, on the facts of this case, I am of opinion that the plaintiff has shown no cause of action against the defendants, and I think the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for appellant: *Corbin, Greener, & Cook.*

Solicitors for respondents: *Indermaur & Brown.*

Note.—Liability of former employer, or of association to which former employer belongs, for preventing one's employment or procuring his discharge.

As to the liability of a labor union or its members to persons with
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whose employment it has interfered, see *Read v. Friendly Soc.* 1 B. R. C. 503, and accompanying annotation.

As to the liability of members of a medical association for interference with the practice of a physician by refusing to maintain professional relations with him, see *Pratt v. British Medical Asso.* 9 B. R. C. 982.

The courts agree in holding that the right to be employed is a property right (see *Frank v. Herold* (1902) 63 N. J. Eq. 443, 52 Atl. 152; *Erdman v. Mitchell* (1905) 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; *Jones v. Leslie* (1910) 61 Wash. 107, 48 L.R.A.(N.S.) 893, 112 Pac. 81, Ann. Cas. 1912B, 1158), for a wrongful interference with which there is a right of action (see *Tennessee Coal, Iron & R. Co. v. Kelly* (1909) 63 Ala. 348, 50 So. 1008; *Chambers v. Probst* (1911) 145 Ky. 381, 36 L.R.A.(N.S.) 1207, 140 S. W. 572; *Carter v. Oster* (1908) 134 Mo. App. 146, 112 S. W. 995; *Brennan v. United Hatters* (1906) 73 N. J. L. 745, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; *Connell v. Stalker* (1897) 20 Misc. 423, 45 N. Y. Supp. 1048; *Davis v. United Portable Hoisting Engineers* (1898) 28 App. Div. 396, 51 N. Y. Supp. 180; *Holder v. Cannon Mfg. Co.* (1904) 125 N. C. 392, 47 S. E. 481, reversed on rehearing on another ground in (1905) 138 N. C. 308, 50 S. E. 681; *Raycroft v. Tayntor* (1896) 68 Vt. 219, 33 L.R.A. 225, 54 Am. St. Rep. 882, 35 Atl. 53; *Badger Brass Mfg. Co. v. Daly* (1909) 137 Wis. 601, 119 N. W. 328); and that the fact that the plaintiff's employment is terminable at the will of the employer does not affect his right of action (see *Tennessee Coal, Iron & R. Co. v. Kelly* (1909) 63 Ala. 348, 50 So. 1008; *Chipley v. Atkinson* (1887) 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934; *London Guarantee & Acci. Co. v. Horn* (1904) 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526; *Gibson v. Fidelity & C. Co.* (1908) 232 Ill. 49, 83 N. E. 539; *Chambers v. Probst* (1911) 145 Ky. 381, 36 L.R.A.(N.S.) 1207, 140 S. W. 572; *Perkins v. Pendleton* (1897) 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; *Lucke v. Clothing Cutters' & T. Assembly* (1893) 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; *Moran v. Dunphy* (1901) 177 Mass. 485, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; *Berry v. Donovan* (1905) 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; *Lopes v. Connolly* (1912) 210 Mass. 487, 38 L.R.A.(N.S.) 986, 97 N. E. 80; *Carter v. Oster* (1908) 134 Mo. App. 146, 112 S. W. 995; *Brennan v. United Hatters* (1906) 73 N. J. L. 729, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; *Blanchard v. Newark Joint Dist. Council* (1909) 77 N. J. L. 389, 71 Atl. 1131, affirmed without opinion in (1910) 78 N. J. L. 737, 76 Atl. 1087; *Warschauser v. Brooklyn Furniture Co.* (1913) 159 App. Div. 81, 10 B. R. C.

144 N. Y. Supp. 257; *Dannerberg v. Ashley* (1894) 10 Ohio C. C. 558, 5 Ohio C. D. 40; *Raycroft v. Tayntor* (1896) 68 Vt. 219, 33 L.R.A. 225, 54 Am. St. Rep. 882, 35 Atl. 53; *Flood v. Jackson* [1895] 2 Q. B. 21, 64 L. J. Q. B. N. S. 665, 14 Reports, 397, 43 Week. Rep. 453, 59 J. P. 388, reversed on another ground in [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285, in which the right of action is recognized), even though, from inability to ascertain the amount of damages, a verdict for nominal damages only may result (see *Chipley v. Atkinson* (1887) 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934; *Berry v. Donovan* (1905) 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738).

Their decisions, however, disclose a wide range of opinions as to what is to be considered an unlawful interference, the chief difference of opinion being as to whether the procuring of one's discharge or the prevention of one's employment by the exercise of mere persuasion constitutes an invasion of the right to be employed.

In discussing the elements of the tort involved in unlawful interference with another's employment, it is said in *Labatt, Master and Servant*, § 2666: "In order to render an act which has the effect to interfere with another's employment a violation of his rights, there must be a concurrence of several elements, the absence of any one of which is sufficient to defeat liability, but the presence of any one of which is not conclusive of the existence of liability. There must be then: (a) an intention to bring about the particular result, (b) the use of unlawful means, and (c) absence of justification.

"Of these it is necessary to speak more particularly.

"(a) *Intention to bring about the particular result.* Intention must here be distinguished from motive. Intention has reference to the external end aimed at; motive is the state of mind which induces action.

"Intention connotes knowledge of the relation, either as actually existing or in contemplation. Possibly a constructive knowledge would be sufficient. It does not connote a contemplation of the discharge as a result of the act of interference, but, in accordance with a well-established principle of the law of torts, it will suffice that the result was such as might reasonably have been expected to follow from the doing of the act. . . .

"(b) *The use of unlawful means.* This does not have reference to means in themselves unlawful, but to those which are unlawful as being prima facie (that is, assuming the presence of intention and the absence of justification) an invasion of the complainant's right. At this point we come upon the *fons et origo malorum*,—the difference in judicial opinion as to what constitutes such an invasion; and it becomes necessary to discuss separately—

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"(1) Cases where the right invaded rests in contract, and

"(2) Cases where the right infringed upon is the right to be employed,—in other words, the right freely to contract for the disposition of one's services.

"(1) Where the right invaded rests in contract, unlawful means, according to the preponderance of opinion, are such as are likely to induce the employer to violate the contract (including persuasion), or, according to the view held in a few jurisdictions, wrongful means other than mere persuasion.

"(2) Where the right infringed is the right to be employed (no contract rights being in question), the courts disagree as to whether mere persuasion may constitute an unlawful means. . . .

"Where the view is taken that persuasion, even though exercised in bad faith, is not actionable, the unlawfulness of the means is determined by their effect upon the will of the employer. It is not enough, under this view, to impose liability (assuming the other elements of liability to exist), that the employer would, had not the act been done, have hired the complainant or retained him in his employment. There must be something more than a mere influence acting upon his will. For instance, where the view under discussion prevails, A may lawfully offer to work for less than B, though he knows that it will result in B's discharge, and does so for the purpose of annoying B rather than for the purpose of procuring work for himself; or he may request the employer to discharge or not to hire B, which the employer does out of complaisance towards A. The means used must be such as to preclude the employer's exercise of his free volition. It is not sufficient to offer him a choice; he must be so constrained that he does not feel free to exercise an independent judgment. It is perhaps a sufficiently comprehensive description of such means to say that they are such as to put him in fear of loss or bodily harm to himself or to someone for whom he has affection or regard.

"The lawfulness of the means in this regard must be tested by their effect upon a reasonably prudent, reasonably courageous, and not unreasonably sensitive, man.

"It may further be remarked under this head that the intrinsic unlawfulness of the means used is, in theory at least, irrelevant to the question of their coercive effect upon the will of another; although instances within the range of probability, where means intrinsically unlawful would not have a coercive tendency, must be extremely rare.

"(c) *Absence of justification.* This may connote either (1) the nonexistence in the actor of any right of which his act may be deemed an exercise, or (2) the nonexercise of an existing right, or, as it is somewhat more conveniently put, the exercise of a right in
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bad faith, *i. e.*, for the purpose of inflicting injury on another rather than for the purpose of benefiting the actor.

"The nonexistence of a right in the actor appears to be regarded as establishing beyond doubt that his purpose was to inflict an injury; and in speaking of such a situation the courts sometimes characterize the act of interference as 'wanton.' Here is an opportunity for divergence of conclusions in respect to an identical state of fact, depending upon whether or not the existence of a right in the author of the interference is recognized.

"The existence of a right, on the other hand, does not necessarily establish that the purpose of the actor was to exercise it, although it creates a presumption to that effect. Whether the act of interference in any particular case was done in the exercise of a right or the performance of a duty is not properly a question of law, but one of fact; although the evidence adduced in rebuttal of the presumption that the purpose of the actor was to benefit himself, *i. e.*, to exercise his right, may not in some cases be sufficient to carry the question to the jury. There are certain classes of rights, sometimes termed 'absolute rights,' which when shown to exist in the actor appear to raise a presumption that the act was done in the course of their exercise, so strong as to overcome any inference of an intent to injure, thereby keeping the question from entering the sphere of the jury. Hence it is sometimes said that the existence of such a right constitutes an absolute justification, or that the act is justified as a matter of law.

"It will be apparent, in view of these considerations, that to the question, When may an act which interferes with another's employment be deemed justifiable? no categorical answer can be returned.

"It may be stated generally, however, that the act, to be justifiable, must be done in the performance of a duty, or in the exercise of an equal or superior right."

The act of one interfering with the employment of another may, therefore, be lawful or unlawful according as it is or is not the legitimate exercise of a lawful right on the part of the author of such interference.

Necessity of causal connection between act complained of and loss of employment.

It is essential to a right of action for interference with another's employment that the interference alleged shall be shown to have been caused by the defendant's conduct.

Accordingly, a cause of action for an unlawful interference with plaintiff's occupation is not shown by an allegation that defendant communicated to intending employers the fact that plaintiff belonged to a labor organization, and was a labor agitator, in the ab-

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sence of anything to show that there was any connection between the statement and the failing to secure employment. *Wabash R. Co. v. Young* (1904) 162 Ind. 102, 4 L.R.A.(N.S.), 1091, 69 N. E. 1003.

In *Dick v. Northern P. R. Co.* (1915) 86 Wash. 211, 150 Pac. 8, Ann. Cas. 1917A, 638, a complaint alleging that plaintiff had been a locomotive engineer in the employ of the defendant until a certain day, when the defendant, with intent to injure the plaintiff, destroy his reputation and good name, and deprive him of the confidence of his fellow men, and for the purpose of preventing him from securing other employment and to ruin him in his profession as locomotive engineer, had caused to be published a false, fraudulent, and defamatory instrument in writing purporting to advise plaintiff that he was discharged from defendant's service for intimidating other employees while in the performance of their duty; that it is the custom of the defendant and other railroads to refuse to take into their employ any person who has previously been in their employ or in the employ of another railroad unless the applicant can sign a written reference to and an authorization of former employers to answer inquiries concerning the applicant, and that by reason of this custom a person once in the employ of a railroad company who has been discharged, whether for an honest or dishonest reason or purpose, can never again secure employment with the same or any other company except under an assumed name or by false statement in his application; that the plaintiff had continuously ever since his discharge been making diligent efforts to secure employment in his chosen profession, and, notwithstanding there has been and still is a demand with other railway companies, had been unable to secure such employment, by reason whereof he was compelled to abandon his chosen profession and seek other employment for which he is not specially adapted, to his damage in a stated amount,—was held to be demurrable as failing to show that the alleged damage resulted from any of the acts of the defendant charged, the court saying: "There is no allegation that the defendant and other companies had conspired or agreed to furnish information to each other, or that the defendant ever did in fact furnish any information to any other company concerning the plaintiff, or that the defendant and other railroad companies had ever agreed that the consent of either should be a prerequisite to the employment of its discharged employees by any other. It is not even alleged that there is any custom of railroads not to employ discharged employees of other roads. Wanting some such allegations as these and a claim of resulting damages, the things contained in this fourth paragraph are wholly impertinent to the issue of interference with plaintiff's vocation."

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See also, to the same effect, *Hundley v. Louisville & N. R. Co.* (1897) 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429.

It has been held that the jury may infer that the failure of an employee to secure employment by members of an employers' association was because one of their number who had discharged him circulated among the members of the association a letter requesting them not to employ him in accordance with a rule of the association. *Willner v. Silverman* (1909) 109 Md. 342, 24 L.R.A.(N.S.) 895, 71 Atl. 962.

Liability as affected by existence of combination.

The fact that one's discharge is the result of the act of several acting in combination will not, of itself, give him a right of action. See *DAVIES v. THOMAS* (reported herewith) *ante*, 929; *Huttley v. Simmons* [1898] 1 Q. B. 181, 67 L. J. Q. B. N. S. 213, 14 Times L. R. 150; *Willis v. Muscogee Mfg. Co.* (1904) 120 Ga. 597, 48 S. E. 177, 1 Ann. Cas. 472; *Clemmitt v. Watson* (1895) 14 Ind. App. 38, 42 N. E. 367; *Baker v. Sun L. Ins. Co.* (1901) 23 Ky. L. Rep. 1178, 64 S. W. 967; *Baker v. Metropolitan L. Ins. Co.* (1901) 23 Ky. L. Rep. 1174, 55 L.R.A. 271, 54 S. W. 913; *May v. Wood* (1898) 172 Mass. 11, 51 N. E. 191; *New York, C. & St. L. R. Co. v. Schaffer* (1901) 65 Ohio St. 414, 62 L.R.A. 931, 87 Am. St. Rep. 628, 62 N. E. 1036; *Rhodes v. Granby Cotton Mills* (1910) 87 S. C. 18, 68 S. E. 824.

It is, however, an act requiring justification to combine to procure another's discharge from employment. See *Giblan v. National Amalgamated Labourers' Union* [1903] 2 K. B. 600, 1 B. R. C. 528, 72 L. J. K. B. N. S. 907, 89 L. T. N. S. 386, 19 Times L. R. 708; *Gregory v. Brunswick* (1843) 6 Mann. & G. 205, 134 Eng. Reprint, 866, 6 Scott, N. R. 809, 1 Dowl. & L. 518, 1 Car. & K. 24, 13 L. J. C. P. N. S. 34, 8 Jur. 448; *Jersey City Printing Co. v. Cassidy* (1902) 63 N. J. Eq. 759, 53 Atl. 230; *Mills v. United States Printing Co.* (1904) 99 App. Div. 605, 91 N. Y. Supp. 185.

Justification for employer's conduct.

The right to dispose of one's labor as he will, and to have the benefit of one's lawful contract, is incident to the freedom of the individual, and such rights can lawfully be interfered with only by one who is acting in the exercise of an equal or superior right which comes in conflict with the other. *Berry v. Donovan* (1905) 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738.

The fact that an employee voluntarily abandons his employment does not give the employer a right to prejudice his employment elsewhere. 10 B. R. C.

where. *State ex rel. Scheffer v. Justus* (1902) 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759.

A desire to promote his own welfare will not justify an employer's interference with his employee's obtaining employment elsewhere, if his act constitutes an unreasonable interference with the employee's right to an open market. *Huskie v. Griffin* (1909) 75 N. H. 345, 27 L.R.A.(N.S.) 966, 139 Am. St. Rep. 718, 74 Atl. 595.

And the interest which one may have in retaining his own employee will not justify him in interfering with another's prospective employment for the sake of doing such other an injury. Thus, in *Jones v. Leslie* (1910) 61 Wash. 107, 48 L.R.A.(N.S.) 893, 112 Pac. 81, Ann. Cas. 1912B, 1158, in which it appeared that the plaintiff had been defendant's servant, but, securing a better job, prepared to leave defendant, whereupon defendant, to get even with the plaintiff for "leaving him in the lurch," notified his prospective employers that if they engaged plaintiff, he would deprive them of his custom and trade, it was held that the court erred in withdrawing the case from the consideration of the jury, the court taking the view that persuasion without justification may be actionable.

The existence of a voidable or invalid contract of employment will not justify interference with a former servant's employment by another.

Thus, in *Clark v. Goddard* (1863) 39 Ala. 164, 84 Am. Dec. 777, it was held to be no justification for procuring plaintiff's discharge by representing that he was defendant's indentured apprentice, that an indenture of apprenticeship existed, whereby reason of the plaintiff's infancy, it was voidable by him.

So, also, in *Carmen v. Fox Film Corp.* (1919) 258 Fed. 703 (reversed in (1920) 15 A.L.R. 1209, — C. C. A. —, 269 Fed. 928, on the ground that plaintiff's conduct had been inequitable), it was held that a motion picture actress who had elected to disaffirm a contract made by her when under age was entitled to damages and an injunction against her former employer, who, claiming that the contract was binding, had dissuaded another with whom she had entered into a contract for her services from proceeding with its performance, undertaking to indemnify him against liability thereunder. The court said: "If one maliciously interferes with a contract between two persons and induces one of them to break the contract to the injury of the other, the injured party can maintain an action against the wrongdoer. *Angle v. Chicago, St. P. M. & O. R. Co.* (1894) 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240. That the defendants acted intentionally is proven beyond dispute. The mere fact that they may have thought they had an equitable or legal right so to do is not an answer to an equitable action if they were wrong in this judgment. To do intentionally that which is calculated in the
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ordinary course of events to damage, and which in fact does damage, another person, in his property or trade, is malicious in the law, and is actionable if it is done without just cause or excuse."

In *Lally v. Cantwell* (1890) 40 Mo. App. 44, it was held that the existence of an invalid contract of apprenticeship did not justify the defendant in circulating among employers in his line of business, a notice to the effect that plaintiff was an apprentice in his shop, not out of his time, and that he had quit work without cause, and referring them to a provision in the by-laws of their association that no member shall employ a helper or apprentice who had previously worked for another, without the written recommendation of the latter.

In *Blumenthal v. Shaw* (1897) 23 C. C. A. 590, 39 U. S. App. 490, 77 Fed. 954, it was held that one who was in service under an indenture of apprenticeship supposed to be valid, but not so in fact, and who had, in consequence of some dissatisfaction, been discharged, had a cause of action against his former employer for the act of his superintendent in notifying other manufacturers in that line in the city, that plaintiff, an apprentice, had left without cause, and requesting other manufacturers not to employ him, and in requesting some who had employed him in ignorance of his identity to discharge him, in consequence of which plaintiff was obliged to go elsewhere to obtain employment.

An illegal contract cannot be invoked as justification for interference with another's employment.

Thus, in *Illinois Steel Co. v. Brenshall* (1908) 141 Ill. App. 36, where the plaintiff had been discharged in pursuance of an agreement between the two employers to force a settlement and the execution of a release by anyone injured in the employ of the other by presenting him the alternative of discharge by the company in whose employ he was injured and the refusal of the other to employ him, or to retain him in his employment, it was held that he might have his action for damages against his former employer.

Preventing employment or causing discharge by persuasion or remonstrance.

It is to be noted that the scope of the decision in the reported case (*DAVIES v. THOMAS*, *ante*, 929) is carefully limited by the learned judges participating therein to the state of facts before them as found by the court below. Lord Sterndale, M.R., and Warrington, L.J., lay stress on the fact that, notwithstanding the persuasion was brought to bear on plaintiff's employer by members of his association at an association meeting, there was expressly found to have been no coercion, stress, or improper pressure of any kind. Lord Sterndale further limits the effect of his decision by

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remarking: "There was not even an attempt to induce Mr. Hopkins [plaintiff's employer] to give him [plaintiff] notice in any event. What he was asked to do was to give him notice unless he was prepared to give up employing the plaintiff for the purpose of canvassing the defendant's customers. If he did that, there was no objection to his continuing to employ the plaintiff."

In *McCarter v. Baltimore Chamber of Commerce* (1915) 126 Md. 131, 94 Atl. 541, it was held that no cause of action against an incorporated produce exchange was stated by a complaint alleging, in effect, that while plaintiff was employed by several individual members of the corporation and indebted to another of such members, the corporation compelled his employers to discharge him, and to refrain from further dealings with him, under threat, by virtue of a by-law, of themselves being denied the privileges of membership in the corporation. This conclusion is put upon the ground that the by-law in question simply gave the members the choice of complying therewith or ceasing to be members of the corporation, and therefore was not, in law, coercive in effect.

Where the view is entertained that persuasion may, under the circumstances of the case, constitute an unlawful means of interference with another's employment, it is a question for the jury whether the rights of the employee have been unjustifiably invaded by the act of the former employer in complaining to one who had offered him employment about the hiring of men from his factory in the middle of the day, in consequence of which such other person disclaimed any intention to deal unfairly and directed his foreman not to let plaintiff come to work. *Huskie v. Griffin* (1909) 75 N. H. 345, 27 L.R.A.(N.S.) 966, 139 Am. St. Rep. 718, 74 Atl. 595.

In *Iron Moulders' Union v. Allis-Chalmers Co.* (1908) 20 L.R.A. (N.S.) 315, 91 C. C. A. 631, 166 Fed. 45, it is said, *obiter*, that an employer, having locked out his men in order to effectuate the purpose of his lockout, may persuade other employers not to employ men for higher wages or on better terms than those on which he made his stand, and not to take in his late employees at all, so that they may be forced to come back to him at his own terms.

It seems one may lawfully object to the employment by another of his former employees, where it has been agreed between them that neither will employ a former employee of the other for a certain period after the termination of the relation, and the second employer, who discharges an employee in pursuance with such an arrangement, cannot be held liable on the ground of conspiracy.

Thus, in *Baker v. Sun L. Ins. Co.* (1901) 23 Ky. L. Rep. 1178, 64 S. W. 967, it was held that plaintiff's former employer, an insurance company, was not liable for plaintiff's discharge by another company caused by the operation of an agreement between the two

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companies that neither would employ a solicitor who had been in the service of the other until two years after he had ceased work, no coercion or deception being employed. It should be noted in connection with this decision, however, that the Kentucky courts do not regard malicious persuasion as actionable, even where employed to induce the violation of a contract.

And in *Baker v. Metropolitan L. Ins. Co.* (1901) 23 Ky. L. Rep. 1174, 55 L.R.A. 271, 64 S. W. 913, it was held that an insurance company could not be held liable on the ground of conspiracy for dismissing a solicitor not employed for any definite time, although it did so in pursuance of an agreement with another insurance company, by which the plaintiff had formerly been employed, that neither would employ a solicitor who had ceased to work for the other until two years after he had ceased to work; the act done by the employer being in pursuance of an absolute right.

Circulation of false statements.

Where interference with another's employment takes the form of false and defamatory statements, an action will lie therefor; although the defendant may escape liability by showing the statements to have been privileged, unless his plea of privilege is avoided by proof of express malice.

An employer who fraudulently represents that an employee dishonorably left his employment, for the purpose of preventing his securing work with a new employer, may be held liable for the damages caused by his failure to obtain the new situation because of such representation. *Huskie v. Griffin* (1909) 75 N. H. 345, 27 L.R.A.(N.S.) 966, 139 Am. St. Rep. 718, 74 Atl. 595.

Where several railway companies had made an agreement that no person discharged for a good cause by any of the parties to the agreement shall be employed by any of the others, it is an actionable wrong on the part of one of those companies to enter upon its record a false statement as to its reason for discharging an employee. *Hundley v. Louisville & N. R. Co.* (1897) 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429. It was held, however, that the declaration in this case was defective as not containing any averment that the servants had sought employment, and been refused in consequence of the wrongful acts, the reason assigned being that an agreement of this character is not legally injurious to the servant unless it has actually been carried out to his damage.

In *Freit v. Belmont* (1909) 132 App. Div. 723, 117 N. Y. Supp. 656, in which it appeared that defendant had published in a racing paper the statement that the plaintiff, who had been indentured to serve in defendant's racing stable, had left his employ without his consent or a written discharge, and that owners and trainers were

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warned against harboring or employing him, when as a matter of fact the defendant had discharged him in accordance with the contract, it was held that a judgment for the defendant should be reversed. The court said: "He had already discharged the boy, and the latter was freed from the obligations of the indenture agreement, and entitled to any employment he could obtain. The defendant, therefore, was not justified in depriving the plaintiff of employment, by publishing to those who were bound under the racing rules to refuse employment in such circumstances that the plaintiff left his employ without his consent, and without being discharged."

A member of an association of owners of steam fishing vessels, which had resolved that a "register of defaulting crews" should be kept and that if one of the crew of the vessel belonging to a member should, when engaged to go to sea, refuse to do so, or should come on board drunk, the member should report his name to the secretary for insertion in the register, is not liable for reporting an engineer to the secretary as having been drunk, and having refused to proceed to sea, since in making the report the defendant was privileged, and therefore not liable in damages for slander in the absence of proof that he had exceeded his privilege. *Keith v. Lauder* (1906) 8 Sc. Sess. Cas. 5th series, 356, 43 Scot. L. R. 230, 13 Scot. L. T. 650.

See also in this connection *Rhodes v. Granby Cotton Mills* (1910) 87 S. C. 18, 68 S. E. 824, and *Willis v. Muscogee Mfg. Co.* (1904) 120 Ga. 597, 48 S. E. 177, 1 Ann. Cas. 472, under "Blacklisting," *infra*.

Blacklisting.

There is a right of persons having a common interest in information, to communicate it to one another. It has accordingly been held that, in the absence of evidence of an improper purpose, and where no element of misrepresentation is involved, it is not actionable for an employer to circulate among other employers having a common interest a black list containing the plaintiff's name; but that where the principal purpose is retaliation, such blacklisting gives a right of action.

A number of employers may lawfully agree among themselves not to employ any person who, while in the service of any of them, has participated in a strike or who has shown himself to be negligent, incompetent, inefficient, or dishonest. *New York, C. & St. L. R. Co. v. Schaffer* (1901) 65 Ohio St. 414, 62 L.R.A. 931, 87 Am. St. Rep. 628, 62 N. E. 1036.

In *Rhodes v. Granby Cotton Mills* (1910) 87 S. C. 18, 68 S. E. 824, it is held that employers may combine to circulate among themselves lists of names of strikers and other persons whose employment

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would for any cause be undesirable, so long as such combinations are entered into and used for promoting the legitimate business of those concerned; but that where an employer, after knowledge that the plaintiff is not a striker, wilfully persists in representing him to be one by means of a black list circulated among employers, as a result of which he is unable to obtain employment, he becomes liable therefor.

In *Jenkinson v. Nield* (1892) 8 Times L. R. 540, it was held not actionable, in the absence of evidence that defendants were actuated by any motive other than self-interest, to interfere with the plaintiff's employment by circulating a black list containing his name among the members of an association of employers who had pledged themselves not to employ members of a certain labor union until they should accede to the terms desired by the masters.

In *Bulcock v. St. Anne's Master Builders' Federation* (1902) 19 Times L. R. 27, it appeared that plaintiff, who had been locked out by a former employer in consequence of a wage reduction, and who had subsequently found employment elsewhere, was paid off and discharged without any breach of contract on the part of his employers, as a consequence of the action of the defendants, a federation of master builders who had participated in the lockout, in asking a society, with which both the defendant society and the local association to which plaintiff's employers belonged were affiliated, to intervene for the purpose of inducing them to discharge him. One of the rules of the federation was that, in every case of dispute, no member should employ any workman who was on strike or locked out from the workshop of another member. Another rule was, that members should not supply material or labor to any person who by his action was rendering himself obnoxious to the federation. Upon this state of facts, it was held, that as it had been found by the trial judge that there was no evidence of any act done with an intention to injure the plaintiff, and that there was no evidence of anything except acts by the defendants to further their own purposes, and as the plaintiff's employers had not been induced to do any illegal act, the trial judge correctly held that there was no evidence of any actionable wrong.

In *Willis v. Muscogee Mfg. Co.* (1904) 120 Ga. 597, 48 S. E. 177, 1 Ann. Cas. 472, it was held that where several employers in a city make a rule that employees who leave without cause must give notice and continue working during the period covered by the notice, and agree to report to each other all employees who leave without compliance therewith, and, except in special cases, not to employ men so reported, such agreement, although voluntary and not enforceable, is not, in the absence of malice, an unlawful combination or conspiracy which will make such company liable to men properly
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reported for a violation of the rule, but that an employer who wrongfully reports an employee and thus damages him by preventing his getting work would be liable. The court took the position that "an employer has a right to select his employees according to what standard he may choose, though such standard be arbitrary or unreasonable. An employer certainly has a right to refuse to employ anyone whom he knows to have left another employer in violation of a reasonable rule which both employers are seeking to enforce." Accordingly "an agreement among a number of employers to report such violations and thus assist each other in the selection of their employees is not unlawful though coupled with an agreement to employ no one so reported." In the course of its opinion, the court says: "While the corporations which entered into the agreement above described had a right to do so, they owed a duty to their employees not to abuse that right. If one of them falsely reported an employee to his injury, such employee may recover for the tort. The combination of the employers was a powerful machine for the accomplishment of lawful results, but it was capable of misuse to the injury of innocent employees. When a company so misuses it, such company must take the consequences. . . . If the employer who promulgated the regulation made a mistake in its construction and applied it to a state of facts which did not come within it, the employee injured by such mistake has a right to recover. The employer cannot arbitrarily place an employee upon the black list as having violated the regulation, when, in point of fact, the employee's conduct did not come within the terms of such regulation, and he therefore had not violated it."

In *Cornellier v. Haverhill Shoe Mfrs. Asso.* (1915) 221 Mass. 554, L.R.A.1916C, 218, 109 N. E. 643, it was held that the conduct of members of an association of manufacturers in blacklisting the striking employees of one of their number was not justifiable, the court saying: "A combination to blacklist is the counter weapon to a combination to boycott, and is open to similar legal objections when directed against persons with whom those combining have no trade dispute, or when the concerted action coerces the individual members, by implied threats or otherwise, to withhold employment from those whom ordinarily they would employ."

In *Willner v. Silverman* (1909) 109 Md. 342, 24 L.R.A.(N.S.) 895, 71 Atl. 962, it is held that the circulation of a letter from an employer who had discharged an employee, through the instrumentality of an organization of employers of which the employer is a member, which does not state the cause of the discharge with strict accuracy, but which requests the association to refuse employment to the discharged employee, "as we would like to make an example of him," is actionable if damage results therefrom.

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Statutory liability.

If one employer by conference with another employer prevents, without excuse or justification, and with a malicious motive or purpose, a third person from procuring employment with such other employer, he is liable for damages under Minnesota Revised Laws 1905, § 5097, providing that it shall be unlawful for any two or more employers to combine or confer together for the purpose of preventing any person from obtaining employment. *Joyce v. Great Northern R. Co.* (1907) 100 Minn. 225, 8 L.R.A.(N.S.) 756, 110 N. W. 975.

The acts of a railroad company whereby another company is induced to refuse employment to a track repairer, except upon condition that he release the former company from all claim for damages on account of an injury sustained, are in violation of Minnesota Revised Laws 1905, § 5097, forbidding employers of labor from combining or conferring together for the purpose of preventing any person from procuring employment, and, unexplained by matters of justification, constitute an actionable tort. *Ibid.* E. S. O.

[ENGLISH DIVISIONAL COURT.]

DAFEN TINPLATE COMPANY, LIMITED, v. LLANELLY STEEL COMPANY (1907) LIMITED.

[1920] 2 Ch. 124.

Also Reported in 123 L. T. N. S. 225, [1920] W. N. 131, 36 Times L. R. 428, 64 Sol. Jo. 446.

Corporation—Alteration of articles of association—Extent of power.

Under a statute providing that, subject to the provisions of the act and to the conditions contained in the memorandum of association, a company may, by special resolution, alter or add to its articles, and that any alteration or addition so made shall be as valid as if originally contained in the article, an alteration to be valid must be effected in the manner prescribed by the statute, must not exceed the limits of the power conferred by the statute, and must be bona fide for the benefit of the company as a whole.

—Validity of provision enabling majority of stockholders to compel any shareholder to dispose of his shares.

A resolution adopted by a company having no power under its original articles of association to acquire compulsorily shares of members, altering its articles of association by providing that a majority of the stockholders may determine that the shares of any member shall be offered for sale by the directors to such person or persons (whether a member or

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members or not) as they should think fit, at a fair value to be fixed from time to time at stated intervals by the directors,—is invalid as putting it within the power of the majority to compel any member, although there may be no complaint of any kind against his conduct, to transfer his shares, thereby going further than is necessary for the protection of the company from the conduct of shareholders detrimental to the company's interests.

— *Validity of exemption of particular stockholders.*

An amendment to the articles of association of a company providing for the compulsory transfer of the shares of its members is, even though otherwise unobjectionable, invalid where it excepts one particular member from the operation of the power, thereby conferring upon him a privilege in which other stockholders of the same class do not participate.

— *Provision for ascertainment for value by directors.*

It seems that an amendment of a company's articles of association providing for the compulsory transfer of the shares of any member at the fair value to be fixed from time to time at stated intervals by the directors is not open to objection because the ascertainment of the fair value is left to the directors, where it appears that the directors and shareholders have acted without any vindictive motive.

(March 2, 1920.)

[125] WITNESS ACTION.

The plaintiff company, which was a company limited by shares and incorporated under the Companies Acts 1862 to 1893, was the holder of fully paid shares to the nominal value of 5,000*l.* in the capital of the defendants, the Llanelly Steel Company (1907) Limited (hereinafter called “the Llanelly Company”), a private company incorporated in 1907 under the Companies Acts 1862 to 1900, with a share capital of 250,000*l.* divided into 5,000 shares of 50*l.* each. Each 50*l.* share was subsequently converted into 50 shares of 1*l.* each. This company was the successor of the Llanelly Steel Company, Limited, which was formed in 1896.

The following statement of the facts is taken from his Lordship's judgment: “The original company was a very successful undertaking, and in 1907 it was determined to reconstruct the company and raise fresh capital for the purpose of enabling its operations to be extended. The company's business consisted of the manufacture of steel bars which were purchased by tin plate companies and firms, which then rolled the bars into plates and covered the plates with tin, thus converting them into tin plates.

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It was thought desirable to offer the new capital to tin plate companies and persons having influential positions in the tin plate business in the Llanelly district, with the object of securing a market for the increased output. At that time, as now, the principal shareholders were the Briton Ferry Steel Company, Limited, the Old Castle Iron & Tinplate Company, Limited, and the Western Tinplate Company, Limited. The Briton Ferry Steel Company did not and does not make tin plates. It was and is a manufacturer of steel bars outside the Llanelly district, and neither was nor is a competitor of the Llanelly Company. Its managing director has throughout been the managing director of the Llanelly Company, and it has in this way very largely contributed to the success of the Llanelly Company. Various tin plate companies in the Llanelly district, including the plaintiff [126] company and the defendants, the Old Lodge Tinplate Company, Limited, and at least one managing director or manager of a tin plate company in the district, were approached before the formation of the present Llanelly Company and agreed to take shares in the new company, which on its incorporation proceeded to allot shares to these companies and persons. There was not any agreement by any of the shareholders to take a supply of steel bars from the new company; it was thought that the interest of the shareholders in increasing the profits of the company would be sufficient to insure that they would take what steel bars they required from the company. This anticipation has in the main proved correct, as shareholders engaged in the tin plate industry have taken the greater part of their supplies of steel bars from the company. But in the year 1912 the plaintiff company and its managing director, Mr. John, formed another steel company called the Bynea Steel Works, Ltd. This company has works within a few miles of the Llanelly Company. One of its principal shareholders is the plaintiff company, and Mr. John became chairman of the directors of the Bynea Company. The result has been that since 1913 the plaintiff company has taken the steel bars which it needed from the Bynea Company and has ceased to give any of its custom to the Llanelly Company. In these circumstances the directors of the Llanelly Company thought that it was not desirable that the plaintiff company should

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continue to be a member of the Llanelly Company. In 1913 Mr. John had a conversation with Mr. Williams, the chairman of the directors of the Llanelly Company, in the course of which Mr. Williams expressed the opinion that the plaintiff company ought not to continue to be a shareholder in the Llanelly Company, and this view appeared to Mr. John to be sensible. As a consequence of this conversation there were some spasmodic negotiations for the transfer of the plaintiff company's shares, but they proved unsuccessful.

"The articles of association of the Llanelly Company, which is a private company, contained restrictions on the transfer of shares under which, if the price was not agreed, it was to be determined by the auditors of the company. The plaintiff [127] company objected to having the value of its shares ascertained in this way, and no agreement as to price was reached. The plaintiff company was at first prepared to sell its shares for 10,000*l.*, but the price asked by the year 1919 had risen to 25,000*l.* In these circumstances in the year 1918 the directors of the Llanelly Company, who were honestly convinced that it was not to the interest of the company that the plaintiff company should remain a shareholder of the company and had realized that some of the other members of the company were taking some of their supplies from the Bynea Company, considered the question whether the articles of association of the Llanelly Company should be altered so as to render it possible for the shareholders to expropriate a shareholder who acted in a way similar to that which had commended itself to the plaintiff company. The directors' action was not, in my opinion, directed against the plaintiff company alone. They had, or thought they had, ground for apprehending that another steel company might gain control of the Old Castle Tinplate Company or the Western Tinplate Company, and divert its custom from the Llanelly Company. If this control were secured there would also be this additional peril. Under the articles of association of the Llanelly Company, the Old Castle Company, the Western Company, and the Briton Ferry Company nominated two directors of the Llanelly Company each; and if a steel company obtained control of one of them it would in fact nominate two of the directors of the Llanelly Company, and thus have an opportunity of acquiring

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ing useful information respecting the business of the Llanelly Company, and thus obviously might cause very serious detriment to the Llanelly Company. In these circumstances the resolutions to which exception is taken in this action were submitted to the shareholders of the Llanelly Company.

"Before I deal with the resolutions in question I propose to refer to the articles of the Llanelly Company as they existed before these resolutions were passed. The company is a private company. Under the articles a shareholder who desires to sell his shares must give notice to the directors, who [128] thereupon become his agents for the sale of the shares at a price to be agreed upon between him and the board, or, in case of difference, to be determined by the auditor. The shares then have to be offered to the members of the company, and any which are not taken by members may then be sold by the shareholder to any person at a price not less than the price which has been fixed in the manner described. There are very special provisions in respect of the appointment of directors. The Old Castle Company, the Western Company and the Briton Ferry Company have the right to nominate two directors each. The six directors so appointed can appoint three more additional directors who are to be 'deemed' to represent all the shareholders other than the three companies which I have mentioned, and are called the shareholders' directors. The six directors and the shareholders' directors have power to appoint three more directors called supplemental directors. The three companies must always have six nominees on the board, whose qualification in fact is the holding of the office of director of the nominating company; and as the appointment of the remaining directors is substantially in the hands of the six nominated directors, the three companies have in fact the control of the board of directors. In 1919 a number of proposed alterations of the articles were submitted to the shareholders. The material alterations relate to voluntary and compulsory transfers. [His Lordship read the proposed new articles, which, so far as material, are set out below, and continued:] Those resolutions were passed as special resolutions. At the first general meeting which considered them it was explained that the provisions for compulsory transfer were intended to meet such cases as that of the

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plaintiff company's conduct in connection with the Bynea Company, and a possibility of a steel company obtaining control of the Old Castle Company or the Western Company. Two of the persons at the meeting at first doubted the propriety of the proposal but were converted. The representative of the Old Lodge Tinplate Company, which has been added as a defendant in this action, disapproved and voted against the proposal."

[129] The proposed new articles were numbered 42A and 42B.

42A dealt with the case of members who were desirous of selling or transferring their shares, and required them to offer such shares to the other members at a "fair value," which was defined as follows:—

"(c) The fair value aforesaid shall be ascertained as follows:—

"(1) The board shall from time to time by resolution passed at a board meeting declare the fair value of the preference shares and the fair value of the ordinary shares comprised in any transfer notice. The notice convening any such board meeting shall state the intention to fix such fair value, but it shall not be necessary to state in such notice the amount of such fair value."

42B dealt with compulsory transfer of shares, and was as follows:—

"Compulsory Transfer."

42B. The company in general meeting may determine that the shares of any member (other than the Briton Ferry Steel Co., Ltd.) hereinafter called the outgoing member shall within fifty days after the passing of such resolution be offered for sale by the board to such person or persons (whether a member or members or not) as the board shall think fit at the fair value to be ascertained under subclause (a) hereof. On the passing of any such resolution the following provisions shall apply videlicet:—

"(a) The fair value aforesaid shall be ascertained as follows:—

"(1) The board shall from time to time by resolution passed at a board meeting declare the fair value of the preference shares and the fair value of the ordinary sales comprised in any resolution as aforesaid passed at a general meeting of the company. Such respective fair values shall be the same as those to be fixed in accordance with subclause (c) of article 42A."

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[130] "(2) Such resolution of the board shall remain in force until the expiration of one year from the passing thereof or for such less period as shall be specified therein."

"(3) If at any time when a resolution as aforesaid is passed at a general meeting of the company any such resolution of the board fixing the fair value is in force the fair value fixed by any such resolution of the board for the preference shares shall be deemed to be the fair value of the preference shares comprised in the resolution as aforesaid passed at a general meeting of the company, and the fair value fixed by any such resolution of the board for the ordinary shares shall be deemed to be the fair value of the ordinary shares comprised in the resolution as aforesaid passed at a general meeting of the company."

"(4) Forthwith upon payment to the company of the said fair value the board shall send to each member a copy thereof and the date thereof."

"(b) In case the board shall effect any sale of any of the said shares comprised in any resolution as aforesaid passed at a general meeting of the company, the fair value of any share so sold shall be paid to the company, and the company shall pay such fair value to the outgoing member upon his handing to the company the share certificates in respect of the shares sold and proper transfers of such shares. If the outgoing member neglects or refuses to receive such price or hand to the company such share certificate and transfers for the period of twenty-one days from the time he receives a notice in writing from the company that the company is prepared to pay such fair value in exchange for such certificates and transfers, such fair value shall be retained by the company until such certificates and transfers shall be delivered to it, and upon such delivery such fair value shall be paid to the outgoing member, but the company [131] may waive the delivery to it of such certificates and transfers, but any such waiver shall be in writing."

"(c) Forthwith upon payment to the company of the said fair value the names of the persons who shall purchase shares under this article shall be entered in the register of members as the respective holders of the shares purchased by them as aforesaid in the place of the name of the outgoing members. The receipt of
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the company for the said fair value shall be a good discharge to the persons who shall purchase shares under this article, and after the names of such persons shall have been so entered in the register the validity of the proceedings shall not be questioned by any person."

"(d) No sale under this article shall be made of any shares to any member unless the board shall first offer the shares at the fair value to the members (other than the outgoing member) as nearly as may be in proportion to the shares then held by them respectively, and the offer shall in each case limit the time within which the same, if not accepted, will be deemed to be declared, and may notify to the members (other than the outgoing member) that any member who desires any shares in excess of his proportion should in his reply state how many excess shares he desires to have, and if any of the members (other than the outgoing member) do not claim their proportion the unclaimed shares shall so far as required be used for satisfying the claims in excess. In case the board shall offer under this article any shares to the members (other than the outgoing member), and in case any of such shares shall not be capable without fractions of being offered to all the members (other than the outgoing member) in proportion to the shares then held by them respectively, the same shall be offered to such of the members (other than the outgoing member) and in such proportions or in such manner as may be determined by the board."

[132] "(e) In case any shares offered for sale under this article shall not be purchased within the said period of fifty days, such circumstance shall not entitle the holder to transfer the same, and such shares may at any subsequent time or times be again offered for sale under this article in case a resolution as mentioned in this article shall be passed at a subsequent general meeting of the company."

The original articles of association of the Llanelly Company contained no provisions whereby the shares of any member of the company could be compulsorily acquired.

On April 1, 1919, the plaintiff company (suing on behalf of itself and all other members of the Llanelly Company except those who were defendants) commenced this action against the Llanelly

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Company and its directors for a declaration that the resolutions were invalid and not binding on the plaintiff company so far as the same purported to alter the articles of association by the article numbered 42B, and for an injunction restraining the Llanelly Company, its servants and agents, from acting on such article.

The Old Lodge Tinplate Company, Limited, which was the holder of 20,000 ordinary shares of 1*l.* each and thirty-four preference shares of 50*l.* each in the Llanelly Company, desiring to intervene in the action on the ground that it was not properly represented by the plaintiff company, and that its interests were not identical with those of the plaintiff company, was by order added as a defendant in the action.

Cunliffe, K.C., Maugham, K.C., and Dighton Pollock, for the plaintiff company.

The plaintiffs' case is a strong one; this alteration is admittedly being made to expropriate the company and acquire its shares. The doctrine that purchases by persons having a confidential character cannot stand rests upon general principle, per Lord Eldon, L.C. *Ex parte James* (1803) 8 Ves. Jr. 337, 345, 32 Eng. Reprint, 385.

In *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656, 671, 69 L. J. Ch. N. S. 266, 48 Week. Rep. 452, 82 L. T. N. S. 210, 16 Times L. R. 213, Lindley, M.R., said that the power conferred by § 50 of the Companies Act [133] 1862, to alter the articles, must be exercised bona fide for the benefit of the company as a whole. The purchase proposed by the resolution is for the personal benefit of the directors, and is not for the interests of the company as a whole. An alteration for the benefit of the majority, and not for the benefit of the company as a whole, is not good. *Brown v. British Abrasive Wheel Co.* [1919] 1 Ch. 290, 88 L. J. Ch. N. S. 143, 120 L. T. N. S. 529, 35 Times L. R. 268, 63 Sol. Jo. 373. The question has been dealt with recently in *Sidebottom v. Kershaw, Leese & Co.* [1920] 1 Ch. 154, 89 L. J. Ch. N. S. 113, 122 L. T. N. S. 325, [1919] W. N. 299, 36 Times L. R. 45, 64 Sol. Jo. 114, and although, on the evidence, it was held that the resolution was passed bona fide for the benefit of the

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company as a whole, and that a resolution to expel a competing shareholder by buying him out was valid, yet the judgments in that case are very much in point. "The alteration must not be such as to sacrifice the interests of the minority to those of a majority without any reasonable prospect of advantage to the company as a whole." Buckley on the Companies Act, 9th ed. p. 25. *Atwool v. Merryweather* (1867) L. R. 5 Eq. 464, note, and *Menier v. Hooper's Telegraph Works* (1874) L. R. 9 Ch. 350, 43 L. J. Ch. N. S. 330, 30 L. T. N. S. 209, 22 Week. Rep. 396, are both applicable and support the plaintiffs' case. "Directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the cases of *North-west Transportation Co. v. Beatty* (1887) L. R. 12 App. Cas. 589, 50 L. J. P. C. N. S. 102, 57 L. T. N. S. 426, 36 Week. Rep. 647, and *Burland v. Earle* [1902] A. C. 83, 71 L. J. P. C. N. S. 1, 50 Week. Rep. 241, 85 L. T. N. S. 553, 18 Times L. R. 41, 9 Manson, 17, have no application." Per Lord Buckmaster, L.C., in *Cook v. Deeks* [1916] 1 A. C. 554, 564.

In the present case the defendants are seeking to buy out the plaintiff company at a price not settled bona fide by an independent board, and to put the plaintiffs' money into their own pockets for their own personal benefit, and not in the interests of the company. The alterations are inherently objectionable because they are not in the interests of the company and involve a method of fixing an unfair price, and also because they are an oppressive attempt on the part of the defendants to get the shares at their own price.

[134] **Romer, K.C., P. F. Wheeler, and G. Clark Williams**, for the added defendant, the Old Lodge Tinsplate Company. The wide form of this resolution places this defendant company in a difficulty; for if it is valid, although not primarily aimed at this company, there would be no redress if hereafter it was decided to expropriate this company. The Old Lodge Tinsplate Company will be bound hand and foot if this resolution is passed, and there will be no corresponding obligation on the part of the Llanelly Company to supply this company with steel bars. It will not be

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able to bargain but will have to take the bars at the Llanelly Company's price, which is a position into which no shareholder should be put, and would be quite contrary to the terms upon which the Old Lodge Company entered the Llanelly Company, for it was then understood that the Old Lodge Company should be free to buy steel bars elsewhere.

These are not original articles, but new articles introduced by special resolution, and if their introduction involves any oppression of the minority by the majority they cannot stand. In *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656, 671, 69 L. J. Ch. N. S. 266, 48 Week. Rep. 452, 82 L. T. N. S. 210, 16 Times L. R. 213, Lindley, M.R., said that the power must be exercised "bona fide for the benefit of the company as a whole;" that means that the exercise must not only be for the benefit of the company in fact, but also that the shareholders bona fide think that it is. What is not for the benefit of the company in fact does not become so because the shareholders may think that it is. It cannot be for the benefit of the company that a majority should be able to expropriate any shareholder without any reason. If these alterations are allowed to stand not a single shareholder will dare to raise a finger against the majority, and even an original article framed to forfeit the shares of any member commencing or threatening legal proceedings against the company or the directors on payment of the full value of the shares was held invalid. *Hope v. International Financial Society* (1876) L. R. 4 Ch. Div. 327, 46 L. J. Ch. N. S. 200, 35 L. T. N. S. 924, 25 Week. Rep. 203. Mere benefit of the company is not everything, the motive must be bona fide, and any element of unfairness in ascertaining the price is sufficient to vitiate the [135] resolution. *Sidebottom v. Kershaw, Leese & Co.* [1920] 1 Ch. 154, 89 L. J. Ch. N. S. 113, 122 L. T. N. S. 325, [1919] W. N. 299, 36 Times L. R. 45, 64 Sol. Jo. 114; *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656, 671, 69 L. J. Ch. N. S. 266, 48 Week. Rep. 452, 82 L. T. N. S. 210, 16 Times L. R. 213; *Brown v. British Abrasive Wheel Co.* [1919] 1 Ch. 290, 88 L. J. Ch. N. S. 143, 120 L. T. N. S. 529, 35 Times L. R. 268, 63 Sol. Jo. 373; Buckley on the Companies Acts, 9th ed., p. 25. No witness has said that this alteration was for the benefit of the company as a whole; it is for

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the benefit of the majority, but that confuses the majority with the company.

Moreover, the resolution is further objectionable by reason of excluding the Briton Ferry Company from its operation. All shareholders of the same class stand on the same footing, and any resolution altering their rights, unless binding on all the members of the class alike, is impeachable. Per Romer, L.J., in *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656, 682.

The method of ascertaining the price is also objectionable; it is an unfair method because the possible purchasers themselves fix the price. Any element of unfairness in fixing the price is sufficient to vitiate the resolution; that appears from the judgment of Lord Sterndale, M.R., in *Sidebottom's Case* [1920] 1 Ch. 154, 159.

Hughes, K.C., Tomlin, K.C., A. Sims, and Trubshaw, for the defendant company. Articles providing for the getting rid of competing shareholders and even for forfeiting their shares are quite usual (Palmers' Company Precedents, 11th ed., Part I., p. 970); and if inserted in the original articles are perfectly valid. *Borland's Trustee v. Steel Bros. & Co.* [1901] 1 Ch. 279, 70 L. J. Ch. N. S. 51, 49 Week. Rep. 120, 17 Times L. R. 45, the case of a compulsory transfer on bankruptcy; *Phillips v. Manufacturers' Securities* (1917) 116 L. T. N. S. 290, 86 L. J. Ch. N. S. 305, approved in *Sidebottom's Case* [1920] 1 Ch. 154, 89 L. J. Ch. N. S. 113, 122 L. T. N. S. 325, [1919] W. N. 299, 36 Times L. R. 45, 64 Sol. Jo. 114.

If not in the original articles they can be altered by inserting provisions to that effect under § 13 of the Companies (Consolidation) Act 1908; an alteration of the articles under that section is one of the incidents of the shares, and no complaint is open to a shareholder unless he can show that the alteration was not made bona fide in the interests of the company (*Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656, 671, 69 L. J. Ch. N. S. 266, 48 Week. Rep. 452, 82 L. T. N. S. 210, 16 Times L. R. 213); that [136] reservation in favor of the shareholder being the exception to the rule that the court will not interfere in the internal management of a company. *Burland v. Earle* [1902] A. C. 83, 71 L. J. P. C. N. S. 1, 50 Week. Rep. 241, 85 L. T. 10 B. R. C.

N. S. 553, 18 Times L. R. 41, 9 Manson, 17; *Dominion Cotton Mills Co. v. Amyot* [1912] A. O. 546, 81 L. J. P. C. N. S. 233, 106 L. T. N. S. 934, 28 Times L. R. 467, 49 Scot. L. R. 1044; *Foster v. Foster* [1916] 1 Ch. 532, 85 L. J. Ch. N. S. 305, 114 L. T. N. S. 405.

Allen v. Gold Reefs of West Africa [1900] 1 Ch. 656, 69 L. J. Ch. N. S. 266, 48 Week. Rep. 452, 82 L. T. N. S. 210, 16 Times L. R. 213, shows that the alteration can be made to affect the rights of a shareholder even if made to effect a particular object. In *Brown v. British Abrasive Wheel Co.* [1919] 1 Ch. 290, 88 L. J. Ch. N. S. 143, 120 L. T. N. S. 529, 35 Times L. R. 268, 63 Sol. Jo. 373, the interests of the majority of 98 per cent of the shareholders might well have been said to have represented the interests of the company, but the article in question was held to be invalid. That was a very special case, and its authority is, we submit, questionable, having regard to the subsequent case of *Sidebottom's Case* [1920] 1 Ch. 154, 89 L. J. Ch. N. S. 113, 122 L. T. N. S. 325, [1919] W. N. 299, 36 Times L. R. 45, 64 Sol. Jo. 114, on which we rely.

The plaintiffs must establish *mala fides*. We do not allege that there was any legal obligation upon the tin plate manufacturers to take steel bars of the defendant company, but they were asked to become shareholders on the foundation of the defendant company, and there was an honorable understanding to that effect which was carried out up to 1912, when the plaintiff company or its directors were instrumental in forming the Bynea Steel Works as a rival company to compete with and undersell the defendant company and supply the plaintiff and other companies. That was disloyalty and intolerable in a partnership, from which a private company differs little, and has led to the desire to terminate the plaintiffs' membership of the defendant company.

The plaintiffs to succeed must establish want of *bona fides* on the part of the defendant company. *Sidebottom's Case*, *supra*. The defendant directors *bona fide* believed that the alterations were for the benefit of the company, which is enough for § 13. There is no proof of malice of any kind against them. In all the circumstances the resolutions adopt the most desirable method of fixing the price for the [137] shares, and are no more open to
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objection than the method in *Borland's Trustee v. Steel Bros. & Co.* [1901] 1 Ch. 279, 70 L. J. Ch. N. S. 51, 49 Week. Rep. 120, 17 Times L. R. 45.

Maugham, K.C., in reply.

Cur. adv. vult.

Peterson, J., stated the facts as above set out and continued: The question to be determined in this action is whether the resolutions which purport to confer the power of compulsory transfer are valid. The statement of claim alleged that the object of the resolution was to enable the members of the Llanelly Company, who have a controlling interest in the company, to compel the plaintiff company to sell its shares to the other members of the company, including the directors, against the wish of the plaintiff company, and at a price to be fixed by themselves, and thus to deprive the plaintiff company unfairly and oppressively of its property; and that it was the intention of the defendant company, as soon as the plaintiff company's shares had been purchased, compulsorily to declare a bonus on the shares in the Llanelly Company. The allegation as to the bonus which amounted to a charge of dishonesty was not opened by the plaintiff's counsel, nor did they in any way rely upon it. It was, I think, baseless. As to the allegations of the object of the resolution, no doubt it was contemplated that the plaintiff company's shares should be compulsorily acquired. But on the evidence that was not the sole object of the proposal. The real object was to protect the Llanelly Company against what was considered to be conduct on the part of any shareholder which was detrimental to the interests of the company. Having regard to the decision in *Sidebottom's Case* [1920] 1 Ch. 154, 89 L. J. Ch. N. S. 113, 122 L. T. N. S. 325, [1919] W. N. 299, 36 Times L. R. 45, 64 Sol. Jo. 114, it appears that a resolution altering the articles in such a way as to enable the shareholders to compel a shareholder who is actively interested in a competing firm to transfer his shares would be valid on the ground that it was an alteration which was bona fide for the benefit of the company. But in this case the resolution which was passed went much further than the protection of the company from [138] action by shareholders which could be properly con-

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sidered to be detrimental to its interests. The resolution as passed enables the majority of the shareholders to compel any member (other than the Briton Ferry Company) to transfer his shares, although there may be no complaint of any kind against his conduct and it cannot be suggested that he has done, or contemplates doing, anything to the detriment of the company. It is an unrestricted power which authorizes the majority, if they think proper, or if they consider it in their own interests, to require the transfer of his shares by any shareholder other than the Briton Ferry Company. It is true that the directors may offer the shares to any person, whether a member of the company or not; but having regard to the way in which the board is constituted, no one can doubt that if the majority desired to acquire the shares, the directors would offer the shares to the remaining shareholders under subclause (d). As drawn, the resolution authorizes the majority at their will and without any reason, other than the desire to get into their hands the whole of the shares in the company, to expropriate the shares of the minority. I do not think that there is any intention at present of exercising the power in this way, or to this extent, but circumstances may arise in which the majority may think it to their interest to do so. The question is not whether it has been proved that it is intended to exercise the power to its full extent, but whether the articles as altered, which purport to confer this power on the majority, are valid. It is not, in my opinion, any answer to say that the question whether the power which has been taken is too extensive should be raised if and when it is exercised. If the majority has no right to alter the articles in this manner, the minority is entitled to challenge the alterations at once and to object to their incorporation in the articles.

I must therefore consider whether in this case it was within the power of the majority to alter the articles by a special resolution in such a way as to confer upon the majority authority to expropriate any shareholder or shareholders as they thought fit at their will and pleasure. For this purpose [139] I assume that any shareholder who was required to transfer his shares would receive in exchange the proper value of them. By § 13 of the Companies (Consolidation) Act 1908, which reproduces § 50 of the Act of 10 B. R. C.

1862, it is provided that subject to the provisions of the act and to the conditions contained in the memorandum of association, a company may, by special resolution, alter or add to its articles, and any alteration or addition so made shall be as valid as if originally contained in the articles. The effect of this section was considered in *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656, 671, 69 L. J. Ch. N. S. 266, 48 Week. Rep. 452, 82 L. T. N. S. 210, 16 Times L. R. 213. In that case a special resolution had been passed altering the articles of association so as to confer upon the company, which previously had a lien upon the partly paid shares of any shareholder who was indebted to the company, a similar lien on any shares whether partly paid or fully paid. This alteration was challenged by the legal personal representative of one Zuccani, who was the only registered holder of fully paid shares and whose estate was indebted to the company. Lindley, M.R., after observing that the language of § 50 was very wide, stated that the power conferred by it "must like all other powers be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities;" and that "it must be exercised not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded." In other words, the alteration of the articles must be effected in the manner prescribed by the statute; it must not exceed the limits of the power conferred by the statute and it must be bona fide for the benefit of the company as a whole. In that case the Court of Appeal held that it was for the benefit of the company as a whole to alter its articles so as to obtain payment of debts due from shareholders to the company.

In *Brown v. British Abrasive Wheel Co.* [1919] 1 Ch. 290, 88 L. J. Ch. N. S. 143, 120 L. T. N. S. 529, 35 Times L. R. 268, 63 Sol. Jo. 373, shareholders holding 98 per cent of the capital of a company which was in need of further capital were prepared to find the requisite capital if they acquired the remaining shares of the company, [140] and, after vainly endeavoring to purchase those shares by agreement, proposed to alter the articles so as to enable them to acquire the shares compulsorily. The learned judge, after stating that the question was whether this altera-

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tion was within the ordinary principles of justice, and whether it was for the benefit of the company as a whole, came to the conclusion that it was not in fact for the benefit of the company as a whole. This case was considered by the Court of Appeal in *Sidebottom's Case* [1920] 1 Ch. 154, 162, 173, 89 L. J. K. B. N. S. 113, 122 L. T. N. S. 325, [1919] W. N. 299, 36 Times L. R. 45, 64 Sol. Jo. 114, when the court reaffirmed the test applied by Lindley, M.R., in *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656, 69 L. J. Ch. N. S. 266, 48 Week. Rep. 452, 82 L. T. N. S. 210, 16 Times L. R. 213.

In *Sidebottom's Case* [1920] 1 Ch. 154, 162, 173, 89 L. J. K. B. N. S. 113, 122 L. T. N. S. 325, [1919] W. N. 299, 36 Times L. R. 45, 64 Sol. Jo. 114, the Court of Appeal sanctioned an alteration of the articles of association which enabled the directors to require a shareholder who carried on a competing business, or was a director of a company carrying on a competing business, to transfer his shares, and it did so on the ground that the alteration was for the benefit of the company as a whole. It has been suggested that the only question in such a case as this is whether the shareholders bona fide or honestly believed that the alteration was for the benefit of the company. But this is not, in my view, the true meaning of the words of Lindley, M.R., or of the judgment in *Sidebottom's Case, supra*. The question is whether in fact the alteration is genuinely for the benefit of the company. Thus Lord Sterndale accepted and approved of the view expressed by Lord Wrenbury in his book on the Companies Act, 9th ed., p. 25, that "possibly the limitation on the power of altering the articles may turn out to be that the alteration must not be such as to sacrifice the interests of the minority to those of a majority without any reasonable prospect of advantage to the company as a whole," and stated that it agreed with the principle enunciated by Lindley, M.R. Warrington, L.J., protested against the idea that "bona fide" and "for the benefit of the company" were two separate things in Lindley M.R.'s exposition of the law; and Eve, J., in stating the principle to be applied, said: "Was the resolution adopted, or was the alteration made for the benefit [141] of the company or for the benefit of some section of the company, without reference to the benefit of the company as a whole?"

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The question of fact then which I have to consider is whether the alteration of the articles which enables the majority of the shareholders to compel any shareholder to transfer his shares can properly be said to be for the benefit of the company. It may be for the benefit of the majority of the shareholders to acquire the shares of the minority, but how can it be said to be for the benefit of the company that any shareholder, against whom no charge of acting to the detriment of the company can be urged, and who is in every respect a desirable member of the company, and for whose expropriation there is no reason except the will of the majority, should be forced to transfer his shares to the majority or to anyone else? Such a provision might in some circumstances be very prejudicial to the company's interest. For instance, on an issue of new capital, the knowledge that he might be expropriated as soon as his capital was on the point of producing profitable results might well exercise a deterrent influence on a man who was invited to take shares in the company. Mr. Rees, one of the directors of the Llanelly Company, was asked by counsel for the Old Lodge Tinsplate Company whether it would be in the interest of the company as a whole that the Western Tinsplate Company and the Old Lodge Tinsplate Company should be expropriated at the will of the majority, assuming they continued to take bars from the Llanelly Company, and did not set up steel works in competition with the Llanelly Company; and he assented emphatically to the suggestion that it would not be for the benefit of the Llanelly Company as a whole. In my view it cannot be said that a power on the part of the majority to expropriate any shareholder they may think proper at their will and pleasure is for the benefit of the company as a whole. To say that such an unrestricted and unlimited power of expropriation is for the benefit of the company appears to me to be confusing the interests of the majority with the benefit of the company as a whole. In my opinion the power [142] which, in this case, has been conferred upon the majority of the shareholders by the alteration of the articles of association in this case is too wide, and is not such a power as can be assumed by the majority. The power of compulsory acquisition by the majority of shares which the owner does not desire to sell is not lightly to be assumed whenever it pleases the

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majority to do so. The shareholder is entitled to say *non hæc in fœdera veni*; and while on the authorities as they stand at present it is possible to alter the articles in such a way as to confer this power, if it can be shown that the power is for the benefit of the company as a whole, I am of opinion that such power cannot be supported if it is not established that the power is bona fide or genuinely for the company's benefit.

*Objection was also taken to the provision for compulsory transfer on the ground that the Briton Ferry Steel Company was specifically excluded from the operation of the new article. Why this company should be excluded in this way is not very apparent. Mr. Rees's view was that it was because this company was not a customer of the Llanelly Company, or a consumer of bars, and was not a competitor of the Llanelly Company; while Mr. Daniel Williams, the chairman of the directors of the Llanelly Company, thought that the Briton Ferry Company was exempt because it was not a consumer of bars and because it was desired to pay that company a compliment, as it had been largely concerned in the promotion of the Llanelly Company. But the Briton Ferry Company may be bought up by a steel company which competes with the Llanelly Company; it may start steel works within the Llanelly district and compete with the Llanelly Company, and it may gain control of the tin plate companies, members of the Llanelly Company, in which it is now a shareholder, and remove the custom of those companies from the Llanelly Company. In such circumstances Mr. Rees was of opinion that the Briton Ferry Company should be subject to the same provisions as any other shareholders who behave in this way. If one of the shareholders can be excluded from the operation of the altered article in this way it is not apparent [143] why the Western Company and the Old Castle Company should not also be excluded. These two companies also took an active part in the formation of the Llanelly Company, and if they may possibly in the future act to the detriment of the Llanelly Company, so too may the Briton Ferry Company. The power which has been taken, however, is not restricted to cases in which a shareholder's conduct is prejudicial to the Llanelly Company. It is a power which enables the majority to expropriate any shareholders, other than the Briton Ferry Com-

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pany, at their will and pleasure. The exclusion of a shareholder from the operation of such a clause places him in a position of privilege. If the articles are to be altered so as to confer a power of expropriation, the power ought, in my view, to apply to all the shares, unless perhaps it could be established that it is for the benefit of the company that certain shares should be exempt. Prima facie all the shares of the classes affected should be on the same footing; some should not be placed in a position of inferiority or superiority. The majority cannot alter the articles in such a way as to place one or more of the minority in a position of inferiority, as, for instance, by attributing to his or their shares a smaller proportional share of the available profits than that which the others receive, nor can it in my view confer on one or more of its own number benefits or privileges in which other shareholders of the same class do not participate. It may be that the exclusion of some particular shareholder from the operation of an expropriation clause can in some cases be justified by showing that the exclusion is for the benefit of the company as a whole. On that point I do not express any opinion, but assuming this to be so, I am not able to find any adequate reason in this case for saying that the exemption of the Briton Ferry Company from the operation of the new article is or was for the benefit of the Llanelly Company.

Objection was also taken to the ascertainment of the fair value of the shares by the directors under the new article 42B. In the view which I have taken of this case it is unnecessary for me to deal with this contention; but, as at present advised, I should not be prepared to hold that in this case, in which [144] the directors and shareholders of the Llanelly Company acted without any vindictive motive, the alteration of the article is open to objection on the ground that the ascertainment of the fair value is left to the directors.

In my opinion, for the reasons which I have given, the new article 42B is invalid.

Solicitors: *J. B. Somerville, for Brodie & Walton, Llanelly; Speechly, Mumford, & Craig, for Roderick & Richards, Llanelly; Smith, Rundell, & Dods, for F. N. Powell, Llanelly.*

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Note.—Power of corporation to force a member to sell his stock.

In *Sidebottom v. Kershaw Leese & Co* [1920] 1 Ch. 154, 89 L. J. Ch. N. S. 113, 122 L. T. N. S. 325, [1919] W. N. 299, 36 Times L. R. 45, 64 Sol. Jo. 114, where a business corporation in which the majority of the shares were held by the directors passed a special resolution to alter its articles by introducing a power for the directors to require any shareholder who should compete with the company's business to transfer his shares, at their full value, to nominees of the directors, it was held that as a power to expel a shareholder by buying him out would have been valid had it been inserted in the original articles, it might be introduced by amendment, provided that the alteration was made bona fide for the benefit of the company as a whole.

The question of the validity of a provision in the articles of incorporation or by-laws of a business corporation empowering it to compel a stockholder to sell his stock seems never to have been considered in America, although some courts have found occasion to declare that corporations organized for gain have no power of expulsion or forfeiture unless granted by their charters or by general municipal law (*Purdy v. Bankers' Life Asso.* (1903) 101 Mo. App. 91, 74 S. W. 486; *Evans v. Philadelphia Club* (1865) 50 Pa. 107; *Com. ex rel. Burt v. Union League* (1890) 135 Pa. 301, 8 L.R.A. 195, 20 Am. St. Rep. 870, 19 Atl. 1030; *Edgerton Tobacco Mfg. Co. v. Croft* (1887) 69 Wis. 256, 34 N. W. 143); and that an incorporated company has not the power to adopt a by-law subjecting to forfeiture shares owned by individuals in the stock of the company for the nonpayment of assessments thereon, unless the power to pass such by-law is expressly granted by the charter (*Re Long Island R. Co.* (1837) 19 Wend. 37, 32 Am. Dec. 429; *Westcott v. Minnesota Min. Co.* (1871) 23 Mich. 145, 6 Mor. Min. Rep. 336; *Budd v. Multnomah Street R. Co.* (1887) 15 Or. 413, 3 Am. St. Rep. 169, 15 Pac. 659; *Gresham v. Island City Sav. Bank* (1893) 2 Tex. Civ. App. 52, 21 S. W. 556).

In *Boggs v. Boggs* (1907) 217 Pa. 10, 66 Atl. 105, the court compelled specific performance of a contract whereby the owners of the common stock of a corporation agreed that "if in the opinion of the holders of the majority of the common stock of said corporation, a holder of any common stock of said corporation should cease to be a desirable associate, either on account of incompetency or personal conduct, or if a holder of any common stock of said corporation shall voluntarily resign from his or her position, the holders of the majority of said common stock shall be at liberty, and they are 10 B. R. C.

hereby empowered, to appraise the cash value of said stock and re-deem or purchase the same from said party, and said stock so purchased shall be divided or distributed among the holders of said common stock in proportion to the amounts of stock held by each ;” the court saying that as the parties to the contract had a right to make it, it was a binding obligation upon them, and the sole question for determination was whether the majority stockholders had acted in good faith in determining that the defendant had ceased to be a desirable associate.

In *Strong v. Minneapolis Auto. Trade Assn.* (1922) — Minn. —, —, 186 N. W. 800, it was held that a by-law of an incorporated trade association having a membership fee, but no capital stock, that whenever any member of the association should cease to be actively engaged in business the association might, “by a vote of three fourths of the membership issued and outstanding, cancel such membership and retire the same by paying to the holder thereof the par value of said membership, together with earned dividends,” was not unreasonable, and was binding upon a member who had surrendered his original certificate of membership and accepted one making his membership subject to the limitation contained in the by-laws.

And in *Borland v. Steel Bros. & Co.* [1901] 1 Ch. 279, 70 L. J. Ch. N. S. 51, 49 Week. Rep. 120, 17 Times L. R. 45, it was held that provisions in a company’s articles of association providing that on any manager or assistant ceasing to be such, or on his death or bankruptcy, he must, on receiving certain notice, transfer his shares, and that in every case where ordinary shares were held by a person not being a manager or assistant, the directors might at any time give to such person notice, requiring him forthwith to transfer all or any of such shares,—were not void as being repugnant to absolute ownership, or as tending to perpetuity. The reasons given for this conclusion are, that a share is not to be considered as a sum of money which is dealt with in a particular manner, but that it is the interest of a shareholder in the company, measured by a sum of money, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se*; that the contract contained in the articles of association is one of the original incidents of the share; and that the rule against perpetuities has no application whatever to personal contracts.

It was also held that the provision requiring transfer of the shares of a member in event of his bankruptcy at a particular price was not a fraud upon the Bankruptcy Law, where such provision was inserted bona fide, and constituted a fair agreement for the purposes of the company, and was binding equally upon all persons who should come in, so that there was no suggestion of fraudulent preference of one over another, and the shareholders would not be

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compelled to sell their shares in the event of bankruptcy at something less than the price that they would otherwise obtain.

E. S. O.

[ENGLISH COURT OF APPEAL.]

CROFT v. WILLIAM F. BLAY, LIMITED.

[1919] 2 Ch. 343.

Also Reported in 88 L. J. Ch. N. S. 545, 121 L. T. N. S. 18, 35 Times L. R. 556, 63 Sol. Jo. 607.

Landlord and tenant — Tenancy arising from holding over — Date of commencement.

The tenancy from year to year arising from the holding over after the expiration, by effluxion of time, of the term of a lease for one year and part of another, is to be deemed to have commenced upon the date of expiration of the original term, and not upon the anniversary of its commencement.

Courts — Rule of decision — Effect of general misapprehension of law.

The fact that by reason of statements made by text-writers it has been generally supposed that a tenancy from year to year arising from a holding over after the expiration of the original term is to be deemed to have commenced on the anniversary of the commencement of the fixed term does not preclude the court from deciding to the contrary, the situation not being one in which numbers of titles depend upon the law as expressed in the textbooks.

Decision of Astbury, J. [1919] Ch. 277, affirmed.

(May 30, 1919.)

APPEAL from a decision of Astbury, J.

By an agreement dated November 15, 1915, and made between the plaintiff of the one part and the defendant of the other part, the plaintiff agreed to let and the defendant to take certain premises "for the term of one year and one eighth of another year from November 11, 1915, at the yearly rent of 40*l.* payable quarterly on the usual quarter days, the first payment to be for the half quarter ending December 25, 1915, and to be the sum of 5*l.*"

The original term having expired on December 25, 1916, the defendant held over without any further agreement, and the plaintiff accepted payment of the quarter's rent due on Lady Day, 1917.

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On June 8, 1917, the defendant gave notice to quit at [344] Christmas, 1917. The plaintiff took the view that the defendant was a yearly tenant under an implied tenancy commencing on November 11, 1916, that being the anniversary of the commencement of the original term, and he contended that the notice to quit was invalid.

Upon an originating summons taken out for the purpose of determining the question, Astbury, J., held that the implied yearly tenancy commenced at Christmas, 1916, and that the notice to quit was good.

The plaintiff appealed.

Lyttelton Chubb, for the appellant (landlord). The question is whether, where there is an express tenancy for a year and a fraction of a year, and the tenancy has been continued by holding over from year to year, the yearly tenancy is to be deemed to have commenced on the anniversary of the creation of the original term or on that of its termination. It is a fallacy to say that the tenancy from year to year is a new tenancy. It is a continuation of the old tenancy. The whole point in this case is whether it is a new tenancy. If it is, then the respondent is right. A tenancy is not necessarily a new tenancy because it is one implied by law. The tenancy commences at the time prescribed by the agreement. Here the tenancy was a continuation of the old tenancy which commenced on November 15, 1915, the date specified in the agreement. The tenant gave notice to quit in June, and was therefore too late. Astbury, J., has held that the tenancy was a new tenancy commencing at Christmas. That may be a rational view to take, but it is not in accordance with the law. The judge commented on the fact that there was no evidence when the tenant entered into occupation of the premises, but that was not material, because the agreement prescribes the date of the commencement of the tenancy. The rule is thus stated in Halsbury's Laws of England, vol. xviii., p. 448: "Where a lease is for a certain number of years and a part of another year, and the tenant holds over and becomes yearly tenant by payment of rent, the current [345] year of the yearly tenancy is treated as ending on the anniversary of the commencement of the term, and not on that of its

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determination." Here the agreement contains no provision when notice should be given to determine the tenancy. At the end of the period fixed by the agreement either party could have terminated the tenancy without notice. The question is what notice was necessary to be given if the tenancy was continued by payment of rent. The tenancy must be treated as commencing on November 15, 1915.

[Duke, L.J.: Your proposition is a startling one.]

It is generally accepted by text-writers on the subject.

[Warrington, L.J., referred to Woodfall on Landlord and Tenant, 19th ed., p. 418.]

That edition of Woodfall is dated in 1863, shortly after the decision in *Doe v. Dobell* (1841) 1 Q. B. 806, 113 Eng. Reprint, 1340, 10 L. J. Q. B. N. S. 242; 1 Gale & D. 218. All the text-books on landlord and tenant from 1863 downwards have laid down the rule as I have stated it.

In *Sidebotham v. Holland* [1895] 1 Q. B. 378, 387, A. L. Smith, L.J., says: "It appears upon looking into the old authorities that at one time what was to be considered a reasonable notice to quit was not ascertained; but, subsequently, it became settled law that in cases of yearly tenancies half a year's notice, expiring at that period of the year at which the tenancy commenced, was the reasonable notice to be given."

A yearly tenancy created by holding over must determine on the anniversary of the commencement of the original term. *Doe v. Dobell*, *supra*. The only distinction between that case and the present is that there three months' notice instead of six months' notice was required. The decision was that the notice was rightly given for the anniversary of the commencement of the term of one year and six months. That is an express decision on the point now before the court. I also rely upon *Berrey v. Lindley* (1841) 3 Mann. & G. 498, 133 Eng. Reprint, 1240, 4 Scott, N. R. 61, 11 L. J. C. P. N. S. 27, 5 Jur. 1061.

[Warrington, L.J.: You agree that the judgment of Tindal, C.J., lays down no principle at all?]

[346] Yes: the textbooks have assumed that the law is as there laid down by Coltman, J., that the notice to quit is governed by the date of the original entry. See Woodfall on Landlord and 10 B. R. C.

Tenant (19th ed.) p. 418; Fawcett on Landlord and Tenant (3d ed.) p. 471; Redman on Landlord and Tenant (6th ed.) p. 561; Foà on Landlord and Tenant (5th ed.) p. 593; 2 Smith's Leading Cases (12th ed.) p. 123; and Cole on Ejectment (1857) p. 50. Mr. Cole was the editor of the 8th ed. of Woodfall.

[Eve, J., referred to *Doe v. Lines* (1848) 11 Q. B. 402, 116 Eng. Reprint, 527, 17 L. J. Q. B. N. S. 108, 12 Jur. 80.]

That was the case of holding over by an underlessee and is an exception to the rule.

In 3 Bythewood and Jarman's Conveyancing (4th ed.) p. 279, it is stated that "where the original lessee holds over after the determination of the lease, the implied tenancy created by payment and acceptance of rent will be deemed to have commenced from the date which corresponds to his entry under the lease, and not from the determination of the lease." *Roe v. Ward* (1789) 1 H. Bl. 97, 126 Eng. Reprint, 58, 2 Revised Rep. 728, 15 Eng. Rul. Cas. 590; *Doe v. Weller* (1798) 7 T. R. 478, 101 Eng. Reprint, 1086, 4 Revised Rep. 496; *Doe v. Dobell* (1841) 1 Q. B. 806, 113 Eng. Reprint, 1340, 10 L. J. Q. B. N. S. 242; *Humphreys v. Franks* (1856) 18 C. B. 323, 139 Eng. Reprint, 1394; *Kelly v. Patterson* (1874) L. R. 9 C. P. 681, 43 L. J. C. P. N. S. 320, 30 L. T. N. S. 842; and *Berrey v. Lindley* (1841) 3 Mann. & G. 498, 133 Eng. Reprint, 1240, 4 Scott, N. R. 61, 11 L. J. C. P. N. S. 27, 5 Jur. 1061, are there cited.

[Duke, L.J., referred to *Doe v. Watts* (1797) 7 T. R. 83, 101 Eng. Reprint, 866, 2 Esp. 501, 4 Revised Rep. 387, 15 Eng. Rul. Cas. 446].

In *Kelly v. Patterson* (1874) L. R. 9 C. P. 681, 43 L. J. C. P. N. S. 320, 30 L. T. N. S. 842, Brett, J., treated tenancies coming to an end by effluxion of time or by the death or cesser of title of the lessor on the same footing. In either case, if the owner accepts rent from the tenant in possession he adopts him as yearly tenant on the old terms so far as applicable to the continued tenancy. The termination of the original term is gone, but the commencement remains and settles the anniversaries of the date for which notice to quit must be given. In this case the commencement of the original term was November 11, 1915, and it cannot be inferred that the yearly tenancy began at Christmas. *Side-10 B. R. C.*

botham v. Holland [1895] 1 Q. B. 378, 64 L. J. Q. B. N. S. 200, 14 Reports, 135, 72 L. T. N. S. 62, 43 Week. Rep. 228.

[Warrington, L.J., referred to *Doe v. Johnson* (1806) 6 Esp. 10, 9 Revised Rep. 800.]

[347] But see the judgment of Lindley, L.J., in *Sidebotham v. Holland* [1895] 1 Q. B. 382, 64 L. J. Q. B. N. S. 200, 14 Reports, 135, 72 L. T. N. S. 62, 43 Week. Rep. 228.

The comment upon *Doe v. Lines* (1848) 11 Q. B. 402, 116 Eng. Reprint, 527, 17 L. J. Q. B. N. S. 108, 12 Jur. 80, by Brett, J., in *Kelly v. Patterson*, *supra*, is right.

Micklem, K.C., and Foà for the respondent The position of a tenant who holds over on the expiration of his original tenancy is well defined by Cozens-Hardy, M.R., in *Morgan v. Harrison* [1907] 2 Ch. 137, 143: "There is ample authority that a tenant holding over after the expiration of a lease . . . is deemed to hold upon all the terms and conditions of the original tenancy so far as they are applicable to a yearly tenancy."

And in *Dougal v. McCarthy* [1893] 1 Q. B. 736, 740, Lord Esher says: "But, if after the expiration of a lease the jury find that by consent of both parties the tenant remained in possession as tenant, and nothing was said inconsistent therewith, the implication of law mentioned by Lord Mansfield arises, *viz.*, that there is a tenancy from year to year on the terms of the old lease so far as they are consistent with such a tenancy." That principle concludes the question of when notice must be given, because the date of the determination is one of the terms of the old lease and must be imported into the new tenancy. If a new relationship is created there is an end of this case. But it is said that no new relationship is created, but that there is a continuation of the original lease.

[Duke, L.J.: It is put against you that the parties have agreed to a prolongation of an existing tenancy, and that unless there is something to show the contrary, the term must be taken to exist from the beginning of the old tenancy, and reliance may be placed on what was said by Buller, J., in *Right v. Darby* (1786) 1 T. R. 159, 99 Eng. Reprint, 1029, 1 Revised Rep. 169, 15 Eng. Rul. Cas. 616.]

That is turning the original tenancy into a yearly tenancy com-
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mencing on November 11, which it was not. The difficulty really arises from the erroneous statement which has been perpetuated in various textbooks and which originated in *Cole on Ejectments*, p. 50. *Berrey v. Lindley* (1841) 3 Mann. & G. 498, 133 Eng. Reprint, 1240, 4 Scott, N. R. 61, 11 L. J. C. P. N. S. 27, 5 Jur. 1061, and the [348] other cases upon which it purports to be founded are no authority for the statement. *Berrey v. Lindley*, *supra*, was not a case of holding over. It was a yearly tenancy from the commencement. There are some textbooks which do not contain the statement, *e. g.*, Tudor's Leading Cases in Real Property. The authorities show that when a tenant enters in the middle of a quarter and there is a provision in the agreement that the first payment of rent shall be made on the next quarter day, then the year of the tenancy shall date from that quarter day. *Doe v. Johnson* (1806) 6 Esp. 10, 9 Revised Rep. 800; *Doe v. Stapleton* (1828) 3 Car. & P. 275, is an express authority in favor of the respondent. In *Doe v. Grafton* (1852) 18 Q. B. 496, 118 Eng. Reprint, 188, 21 L. J. Q. B. N. S. 276, 16 Jur. 833, there was a yearly tenancy from a particular date, and the rent was made payable quarterly on the usual quarter days. The tenancy was deemed to commence from the first quarter day. It is said that *Sidebotham v. Holland* [1895] 1 Q. B. 378, 64 L. J. Q. B. N. S. 200, 14 Reports, 135, 72 L. T. N. S. 62, 43 Week. Rep. 228, is against our contention, but that case turned on the express language of the agreement. The decision of Astbury, J., was right on principle and on authority.

[Duke, L.J.: It is said that the law as stated in the textbooks has been generally accepted.]

There must be something in the nature of universality in order to bind the court to act upon it. There is nothing to show that the error has been universally accepted.

[Warrington, L.J.: It is not an error affecting title.]

Lyttelton Chubb, in reply.

Warrington, L.J.: The question in this appeal is whether a notice to quit given by the defendant and expiring at Christmas, 1917, was a valid notice, or whether the only valid notice would have been one which would expire on November 11, 1917. Ast-
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bury, J., has held that the notice given was valid, and from his decision the landlord appeals. The facts are not in dispute and are very simple. [The Lord Justice stated the terms of the agreement of November 15, 1915, and continued:] As to the construction of that agreement there seems to be no doubt whatever. It was an agreement by which the premises [349] were to be let for a definite term expiring at Christmas, 1916. Whether the tenancy began on November 11, the date from which the period fixed by the agreement was to run, may be a question, and there is no evidence to show when the tenant entered into possession, and at what date therefore the tenancy under this agreement began. The term unquestionably begins on November 11, 1915, and ends on December 25, 1916. But I will assume for the purposes of this judgment that not only did the term begin on November 11 but the tenancy began on that date, and expired at Christmas, 1916. The tenant did not give up and the landlord did not require possession. On March 25, 1917, the tenant paid and the landlord accepted a quarter's rent, that is to say, one quarter of the yearly rent stipulated for by the agreement. The result of that was that the tenant thereupon became a tenant from year to year upon the same terms as expressed in the original agreement so far as such terms are applicable to a tenancy from year to year. The law on that subject is expressed far better than I can express it by Cozens-Hardy, M.R., in *Morgan v. Harrison* [1907] 2 Ch. 137, 143, where he says: "Now there is ample authority that a tenant holding over after the expiration of a lease, if he pays rent or agrees to pay rent subsequently, becomes, if no other terms are suggested, a tenant from year to year,—a yearly tenant; and there is ample authority that under those circumstances the tenant holding over is deemed to hold upon all the terms and conditions of the original tenancy so far as they are applicable to a yearly tenancy." The tenant therefore became a tenant from year to year. What was the year of that tenancy, dealing with the matter for the moment entirely apart from authority and on the facts as we know them? When did that tenancy from year to year commence and on what date did it determine? I think it quite clearly commenced when the fixed term ended, that is to say, at Christmas, 1916. The first year of it would end at Christmas, 10 B. R. C.

1917, and the subsequent years, if it were not in the meantime determined by a notice applicable to the case of a yearly tenancy, would expire at Christmas in those subsequent years. [350] Not only does that appear to be plainly the effect of what took place, but it seems to me to be in accordance with obvious common sense. When a man has property which he wishes to let and finds a tenant in the middle of a broken quarter, but provides that the rent shall be paid quarterly, what is he thinking of? He is not thinking of the time when the term shall commence; what he is intending to define, and what the tenant is intending to define, is the period of the year at which the tenant shall give up and the landlord shall resume possession; in other words, they are creating what would be denominated a Michaelmas tenancy, a Christmas tenancy, a Lady Day tenancy, or a Midsummer tenancy according to the period at which it comes to an end. If I am right so far that this was a yearly tenancy commencing with the expiration of a fixed period of a year and one eighth, that is to say, commencing as from Christmas, 1916, then that incident of a yearly tenancy which is undoubtedly a legal incident of such a tenancy, —namely, that it is determinable on the anniversary of its commencement by a six months' notice unless there be any stipulation to the contrary, would be applicable to it, and the notice given in May, 1917, expiring at Christmas, 1917, would be not only a valid and sufficient notice, but would be the only notice which could effectually determine the tenancy. But it is said that so to decide is contrary to authority, and that authority compels us to come to the conclusion that there is a rule of law which prevents us from giving that construction and effect to the documents and the acts of the parties which I think ought to be given to them, and which compels us to come to the conclusion that the yearly tenancy which never had any existence until the determination of the previous fixed term is to be deemed to have commenced on the anniversary of the commencement of the fixed term, that is to say, in the present case to be deemed to have commenced not at the time the tenant began to hold over, but on November 11, 1916, while the original term was still subsisting. Of course if the authorities compel us to come to that conclusion we must give effect to them. Accordingly it is necessary to see what the authorities

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are and whether they do force us to come to a [351] conclusion which I am bound to say would be one entirely contrary to that which we ought to infer was the real intention of the parties. The matter stands in rather a curious way. There appeared in Cole on Ejectment, p. 50, which was published in the year 1857, a statement which I will read. I refer to it because it seems to me to be the fons et origo mali, if I may so describe it. "Generally speaking, an implied tenancy from year to year, created by the payment and acceptance of rent after the end or determination of a previous term, will be deemed to have commenced at the same time of the year as the original term; and notice to quit should be given accordingly." Then the author refers to a number of cases, some of which I will refer to later, but none of which, in that part of his note, are cases of holding over after the determination of a previous term by effluxion of time. So far as they are cases of holding over at all they are cases of holding over by the tenant and adoption by the landlord where the previous term has determined by a defect in the title of the lessor. After that passage he adds the following: "And this rule prevails even where the original term did not cease at the same time of the year as it commenced. Thus, where premises were originally demised for five and a half years, and an implied tenancy from year to year was afterwards-created." For that he cites *Berrey v. Lindley* (1841) 3 Mann. & G. 498, 133 Eng. Reprint, 1240, 4 Scott, N. R. 61, 11 L. J. C. P. N. S. 27, 5 Jur. 1061; *Doe v. Dobell* (1841) 1 Q. B. 806, 113 Eng. Reprint, 1340, 10 L. J. Q. B. N. S. 242; and *Kemp v. Derrett* (1814) 3 Campb. 510, 14 Revised Rep. 820; *Berrey v. Lindley* and *Doe v. Dobell*, have been discussed before us, and I propose to say a word about them presently. He goes on: "There seems, however, to be some difference in this respect between a holding over by the original tenant, and by an under-tenant, after the expiration of a term of fourteen and a half years." Then he refers to *Doe v. Lines* (1848) 11 Q. B. 402, 116 Eng. Reprint, 527, 17 L. J. Q. B. N. S. 108, 12 Jur. 80. That is the passage, and it is the middle of that passage beginning with these words: "And this rule prevails even where the original term did not cease at the same time of the year as it commenced," on which the present appellant relies as authority for the proposition for which he contends.

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That statement in Cole appears verbatim in the later [352] editions of Woodfall on Landlord and Tenant, the earlier of which were edited by Mr. Cole himself; it is simply repeated in the words in which the first two passages of that statement in Cole on Ejectment appear in that book. A similar statement, though not in the same terms and not quite so strong and definite, appears in the later editions of some other textbooks. It does not appear in all of them by any means. I need not mention those in which it does appear; some of them are textbooks of great importance on this subject.

I now proceed to consider whether independently of the statement in the textbooks there is any authority for the proposition that where a tenant is holding over after the expiration by effluxion of time of a previous lease for a period of years plus a fraction of a year, the implied tenancy from year to year must be deemed to have commenced on the anniversary of the commencement of the original term. Is there any authority for that proposition? In my opinion there is no such authority. The first case referred to by Mr. Cole is *Berrey v. Lindley, supra*. That was a somewhat peculiar case. An agreement was made by which a tenant entered into possession, and the agreement purported to be for five years and a half from Michaelmas, 1823. Notice was given to determine the tenancy at Michaelmas, 1835, that is to say, more than five years after the commencement of the tenancy, and it was held that that notice was valid. Of course if the original term of five and a half years had in law been a term of that period, then this would have been a case of holding over after the expiration by effluxion of time of a previously existing term, and it would have been a case in which a notice to quit expiring on the anniversary of the commencement of the original term, and not on the anniversary of its determination, would have been held to be a valid notice. But when you look at it there is one material fact which I have not yet stated, and that was that the original lease for a term of five and a half years was void by reason of the Statute of Frauds, consequently there was no definite term of five and a half years, but the tenant having been in possession and he having paid [353] rent and the landlord having accepted rent, he had been in fact a tenant from year

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to year from the beginning, with the possible stipulation, I will not say at the moment whether effectual or not, that that tenancy from year to year had the peculiar property that it might have been determined by a notice at the end of the first five and a half years. Whether that was so or not does not matter. The point is that that was a tenancy from year to year from the first; it was a Michaelmas tenancy, and it was held to have been rightly determined as a Michaelmas tenancy; there was no case of holding over at all, and for that reason it plainly does not support the proposition which is stated as I have said in the textbooks.

The other case was *Doe v. Dobell* (1841) 1 Q. B. 806, 808, 113 Eng. Reprint, 1340, 10 L. J. Q. B. N. S. 242; 1 Gale & D. 218. Both the reports are extremely meager, and it requires some care and the exercise of some ingenuity to find out exactly what was the view taken by the learned judges who decided it and the grounds on which they proceeded, particularly the latter. There, the facts were that the lessor of the plaintiff, that is Robinson, had demised the premises to the defendant by an agreement dated August 13, 1838, for one year and six months certain from the date of that agreement at the yearly rent of 26*l.* to be paid quarterly, the first quarterly payment to be made on September 29 then next, but the proportion of the rent to be repaid to the tenant; that is to say, he was to make a quarter's payment of rent on September 29 and was to be allowed for the broken half quarter. It was further agreed that three calendar months' notice should be given on either side previous to the determination of the tenancy. The defendant entered and held under the agreement to the end of the year and six months, and afterwards until the bringing of the action, which was on October 5, 1840. On May 7, 1840, the lessor, that is, the landlord, gave the defendant notice to quit on or before August 13 next. That was the anniversary of the day on which the tenancy commenced. Then the notice goes on: "Or at the expiration of the current year of your tenancy which [354] shall expire next after the end of three months from and after your being served with this notice." The notice was objected to on the part of the defendant. The judge held it good and the jury under his direction found a verdict for the plaintiff. Then there was a motion for a new trial on the ground

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of misdirection. The Court of Queen's Bench held that the direction of the learned judge was correct and dismissed the application for a new trial, and refused the rule. If that were a case of holding over from the determination of a fixed term which had expired by effluxion of time it again would be an authority in support of the proposition which the appellant contends for here. But when the case is looked at, and when the judgments of the judges who took part in the decision, and especially that of Patteson, J., are considered, I think it is quite plain that what the court held there was, as in *Berrey v. Lindley* (1841) 3 Mann. & G. 498, 133 Eng. Reprint, 1240, 4 Scott, N. R. 61, 11 L. J. C. P. N. S. 27, 5 Jur. 1061, that it was really a tenancy from year to year from the first. Lord Denman says simply this without any reasons whatever: "I am of opinion that the three months' notice must be calculated with reference to the original commencement of the tenancy." I am reading from the Queen's Bench Report. Patteson, J., does say a little more but not much. He says: "In all cases the 'current year' refers to the time of entry, unless the parties stipulate to the contrary. Here, therefore, the current year would end on August 13th." I pause there for one moment. The expression "current year" which is placed by the reporter in inverted commas is found not in the agreement for tenancy, but in the notice to quit, and it is a little difficult to see why Patteson, J., refers to it; but however there it is.

He then goes on to say, and this is what seems to me to be the important part of his judgment as throwing light on what it really means: "It may be that, on this construction, the 'six months certain' will have no meaning; but if parties will express themselves so vaguely we cannot help the consequences." Now, if the judge had been of opinion that this was a case of holding over after the determination by effluxion of time of a fixed period of a year and six months he would [355] not have been failing to give effect to the expression "six months certain," and I think what is really meant is: "We are of opinion that this was not for a fixed period with a holding over, but that it was a tenancy from year to year from the beginning with possibly a minimum duration of a year and six months;" and that effect might have been given to the agreement. But the point is, I think, the decision
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really was that on the true construction and effect of the agreement in the particular case, and having regard in particular to the provisions as to the notice to determine contained in the agreement, this must be regarded not as a lease for a fixed term followed by a tenancy from year to year implied by law, as upon a holding over, but as a tenancy from year to year from the first, and that Patteson, J., did attach considerable importance to the fact that there was in the agreement this provision requiring the three months' notice appears from the reference which he makes to *Doe v. Dobell* (1841) 1 Q. B. 806, 113 Eng. Reprint, 1340, 10 L. J. Q. B. N. S. 242, in the course of the argument in *Doe v. Lines* (1848) 11 Q. B. 402, 116 Eng. Reprint, 527, 17 L. J. Q. B. N. S. 108, 12 Jur. 80.

So far I have dealt with the only two authorities which are referred to by the text-writers as supporting the proposition that where there is an implied tenancy occasioned by the holding over after the expiration of a fixed term, which does not begin and end at the same period of the year, the tenancy from year to year dates from the anniversary of the commencement, and not from the end of the fixed term.

But reliance is also placed on a number of cases to which I have already referred cited by Mr. Cole as supporting the passage: "Generally speaking, an implied tenancy from year to year, created by the payment and acceptance of rent after the end or determination of a previous term, will be deemed to have commenced at the same time of the year as the original term; and notice to quit should be given accordingly." When you look at those cases they are of this nature; a lease is created we will say by a tenant for life for a term exceeding that for which he had power to create a lease; it expires by the death of the tenant for life, and at an odd period of the year. The reversioner does not desire to disturb the tenant, [356] and the tenant pays and the landlord accepts a quarter's payment of the rent in accordance with the provisions of the lease under which the tenant holds. Then it has been held that acceptance of rent by the landlord under those circumstances, unless there is some fact which qualifies its effect, justifies the court in inferring as a matter of fact that he adopts the tenant as his tenant upon the terms of his original lease, in-
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cluding the period of the year for which that lease is granted. That is to say, that if the original lease was a Michaelmas lease, and the tenant for life dies at some period not being Michaelmas Day it remains a Michaelmas lease. Of course it is a tenancy from year to year only and not for a definite term, but it remains under those circumstances a Michaelmas lease, and would be determinable by notice expiring at Michaelmas. A striking example, not cited by Mr. Cole because it happens to have been decided many years after his book was published, of that state of things, is found in *Kelly v. Patterson* (1874) L. R. 9 C. P. 681, 43 L. J. C. P. N. S. 320, 30 L. T. N. S. 842. The decision was founded on the same principle which I have just been mentioning. I need not go through it in detail, but the facts as stated in the headnote were these: "Premises were let by the owner in fee on a lease expiring at Midsummer, 1866. The lessee underlet to the defendant on a lease from year to year commencing at Michaelmas." The defendant, therefore, the underlessee, had a Michaelmas lease. "The defendant was in possession at Midsummer, 1866 (when the lease of his immediate lessor came to an end)." That is to say, his immediate lessor had granted him a Michaelmas lease, one which would only expire at Michaelmas, 1866; he had no power to grant him more than a tenancy which would expire at Midsummer, 1866,—“and the owner in fee granted a new lease to the plaintiff as from that time. The defendant, who continued to occupy the premises, paid the plaintiff a sum equal to a quarter's rent on the terms on which he had held the premises, as for rent from Midsummer to Michaelmas, 1866.”

Then he went on paying rent at an increased rate, but that was a matter of agreement, and in December, 1873, the [357] plaintiff gave the defendant six months' notice to quit at Midsummer. The decision of the court there was that the proper inference to draw from those facts was that the new landlord had accepted and adopted the sitting tenant as his tenant and upon the terms under which he was holding, which gave him a right to have his lease determined at Michaelmas, and not at Midsummer. That is all—the proper inference to draw from the facts was that the tenant had been adopted on the old terms.

I think I have really said all that is necessary to say for the
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purpose of showing that there is no rule of law which prevents us from coming to the conclusion as to the true effect of what has taken place in the present case, to which, as I have already said, I think the court ought to have arrived. But there are one or two authorities which I think support the view which I have been expressing, because they show this, that the courts try to hold that where in the case of an ordinary yearly tenancy the rent is payable quarterly on the ordinary quarter days, that yearly tenancy shall begin and end on one of those regular quarter days. There are many examples of that. The best, I think, and one of the earliest, is *Doe v. Johnson* (1806) 6 Esp. 10, 9 Revised Rep. 800, which has been discussed a good deal before us. A man goes into possession at an odd time, he pays rent for the odd time up to the next quarter day, and thereafter he pays and the landlord accepts rent at the regular quarter days. The court under those circumstances comes to the conclusion, as it is bound to do, that there is a tenancy from year to year. But it holds, and if I may say so with all respect, quite in accordance with common sense, that the tenancy from year to year does not begin at the odd time but at the first regular quarter day succeeding that odd time, and then goes on regularly as a tenancy from year to year, determinable of course as such tenancies are at the end of each succeeding year, being the regular quarter day, and not the odd date as from which the tenant originally took possession. There are a number of those cases, I need not go through them, which have been cited to us. With reference to that part of the case I must [358] also refer to *Sidebotham v. Holland* [1895] 1 Q. B. 378, 64 L. J. Q. B. N. S. 200, 14 Reports, 135, 72 L. T. N. S. 62, 43 Week. Rep. 228, because a great deal has been said about it in the argument for the appellant. That was a case of a tenancy from year to year, and the question arose whether it began on May 19 or on the succeeding regular quarter day,—namely, June 24,—and it was held that it began on May 19. But when one looks at it the reason why the court came to that conclusion was that the tenancy there was created by a written agreement, and that the terms of the written agreement prevented them from arriving at any other conclusion than that it began, as the agreement provided, on May 19. But I think it is clear if you look at the opening words of

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Lindley, L.J.'s judgment that if it had not been for the terms of the agreement the principle of the cases such as *Doe v. Johnson*, *supra*, might have been applicable to that case, but that those cases were excluded by the fact that there was an express stipulation excluding their application.

There is only one other matter on which I must say a word. The statement in the textbooks to which I have referred has appeared now in well-known books for a good many years, and it is suggested that we ought not lightly to express an opinion contrary to the view thereby expressed. In my judgment, in this particular case, there is no such objection to the judgment we are pronouncing. It is not a case in which numbers of titles depend upon the law as expressed in the textbooks. It may be that the result is that a few notices to quit may have been given and accepted as valid which were not valid, or that a few notices to quit may have been treated as invalid by reason of the statement in the textbooks. But that is the utmost of what will have happened, and under these circumstances I think we are perfectly free to express our own view, and I think for the reasons that I have stated that the yearly tenancy in this case began and ended at Christmas and was duly determined by a notice to quit expiring at Christmas, and that therefore this appeal fails and must be dismissed.

Duke, L.J.: I am of the same opinion. I should add [359] nothing to what has been said by Warrington, L.J., if it were not that the conclusion at which the court has arrived is in contradiction to passages laid down in textbooks which have been regarded as works of authority, and, as is said on the part of the appellant, may well be deemed to have been acted upon by large numbers of persons. For my part I think the rule of law applicable to his case is clear beyond argument if you consider the true nature of the case; and it is, I think, to be regretted that attempts should be made to complicate the simple relations of everyday life, such as those of landlord and tenant under a tenancy from year to year, by treating as arbitrary general rules decisions made in particular cases upon exceptional circumstances. The law of landlord and tenant happily is well settled in this country; and I deem it to have been settled upon the terms of the agreement here beyond all question. If the controversy in this case had been what

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was the effect of the agreement between the parties here it would have been sufficient to say that the agreement between the parties clearly had not the effect which is alleged on behalf of the landlord. The term which was created by the agreement was a term certain, it was not a term from year to year, and it lacked some of the necessary ingredients in any written agreement for a term from year to year. In particular it did not provide for any term of notice. The agreement was for letting for a broken period in the Christmas quarter of 1915 and for the year 1916 down to Christmas; and it was provided that the broken period should be paid for as a half quarter and that subsequent to that there should be a quarterly rent. Now in my opinion the conclusion, and I think the irresistible conclusion, from those facts, when the authorities are taken into consideration, is that that was a tenancy which so far as it could be regarded as the beginning of a tenancy from year to year must be regarded as the beginning of a tenancy from year to year as from Christmas, 1915.

That was the obvious convenience of the case. The quarterly rent ran from that period as a quarterly rent, and the tenancy was to determine at a period which coincided with that period; so, so far as the elements of a tenancy from year to year were [360] in question at all, you had determination of the year's tenancy at Christmas, and you had facts entirely consistent, and in my opinion only consistent, with the commencement of the year's tenancy at Christmas. Upon the construction of the agreement it appears to me the tenant would have been clearly right, and the attempt to treat him as a tenant who had come in upon a yearly tenancy in the middle of a quarter would have been a mere piece of vexation. But the conduct of the landlord is relieved of that character in this case because he has the warrant of text-writers for the view he took of the result of the transaction.

Now what is contended for is that where you have a tenancy for a term certain, with holding over, and the payment of quarterly rent, there is an inflexible rule of law that the tenancy from year to year which is inferred from the occupation and the payment and receipt of the yearly rent shall be deemed to have commenced at the commencement of the term certain. If the law of this country had been decided in that sense it certainly would have been

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contrary to all the settled habits of the people, but ~~we~~ must have been put up with or got over by some means. To my mind the proposition is wrong in principle. There is a very interesting statement in Preston on Conveyancing in that part of the treatise which deals with merger, which explains, in what I think is a very lucid and scientific fashion, the process of reasoning by which you arrive at the conclusion that a term which arose under an express agreement, and a subsequent term following it which arose by conduct of the parties, may be deemed to be merged in one term. I refer to a passage in vol. III. of Preston on Conveyancing which begins at p. 76, and as a matter of instruction can be pursued with interest to p. 83. It begins so far as appears to be of interest in this case with some observations on the applicability of the doctrine of merger to legal entities which differ in their essence. Preston says this on the subject: "The law considers the lease, that is a lease from year to year, which arises by the continued conduct of the parties, with a view to the time which has elapsed as arising from an estate for all that time, including the current [361] year, and with a view to the time to come, as a lease from year to year." He treats it as of the essence of the matter that the whole occupation shall have been in a tenancy which had the characteristics of a tenancy from year to year. If you apply to the various cases in which this matter has been considered the governing consideration that what was being dealt with was a tenancy from year to year, the supposed difficulty in dealing with the authorities entirely disappears. I think the principle of the decisions is that, in the absence of express agreement to the contrary, a tenancy from year to year is to be determined at the end of a year of the tenancy. That seems to me to have been laid down virtually in every case in which the matter has been discussed, so far as the cases have been brought to the attention of the court, and not less in the cases on which the appellant relies than in the general body of the cases which are almost innumerable. That was the principle laid down by Lord Mansfield and Buller, J., and the other judges of the Court of K. B. in Lord Mansfield's time. It is intelligible and I think everybody has acted upon it. Now three cases were cited here as cases to the contrary. Every one of them was a case in which there had been a tenancy with all the characteristics of tenancy from year to year

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before the period of holding over; and when the learned judges there said the tenancy which was determined must be deemed to have begun "at the commencement of the tenancy," they were referring, I think, quite clearly to the commencement of the tenancy from year to year. The cases which laid down the general principle, and which I think were all referred to here, following upon *Right v. Darby* (1786) 1 T. R. 159, 99 Eng. Reprint, 1029, 1 Revised Rep. 169, 15 Eng. Rul. Cas. 616, began with *Doe v. Johnson*, *supra*, where Lord Ellenborough made the matter perfectly clear, and in language which might have prevented the possibility of misunderstanding under such facts as are found in this case. He said this, as a matter of common knowledge—he cited no authority for it, nobody thought of considering the matter as one which required any authority—"if the tenant comes in in the middle of a quarter, and he afterwards pays his rent for that half quarter, and continues [362] then to pay from the commencement of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter day." Of course he was a tenant from the time of his coming in, in a sense, but Lord Ellenborough, speaking of him as tenant from year to year at common law, makes it clear that he was not tenant from year to year from the time of his coming in, but from the time of the succeeding quarter. That same principle was illustrated in *Doe v. Stapleton* (1828) 3 Car. & P. 275, before Park, J., who founded himself on the passage in *Doe v. Johnson* (1806) 6 Esp. 10, 9 Revised Rep. 800; and observed in that case that the tenant never supposed that the tenancy was to begin from the half quarter. *Doe v. Grafton* (1852) 18 Q. B. 496, 118 Eng. Reprint, 188, 21 L. J. Q. B. N. S. 276, 16 Jur. 833, is a case very similar in its material circumstances to the present case. The actual tenancy had begun on April 19. A sum of rent had been paid for the period from April 19 to the quarter day. When the question of notice to quit arose it was held that the tenancy excluded the broken period—a simple and intelligible decision, which it is sought now to disturb by leaving the parties to be bound as a matter of law by a supposed principle which has no foundation in reason. The textbooks in which error has sprung up by the extraction from exceptional cases of an arbitrary general rule have been

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fully dealt with by my Lord, and I do not propose to add anything to what has been said by him. As I stated at the outset of my remarks, the case seems to me in principle to be one of no difficulty, and only to be complicated by a misunderstanding of one or two decisions which were erroneously supposed to have laid down a rule of law. I think the appeal fails.

Eve, J.: There is no dispute of fact in this case, and my Lords have dealt so adequately with the legal results brought about by the relations of the parties that I only propose to add a few observations of my own. Accepting Mr. Chubb's contention that the effect of the agreement of November 15 was to create a tenancy for a fixed term of one year and one eighth of another year, that is to say, for a term of which the dates [363] of commencement and determination were not coincident, the first question that arises is, What was the effect of the payment and acceptance of rent on March 25 following upon December, 1916? Now admittedly that created a tenancy from year to year, and the next and important question is, as from what date. The only reported case to which our attention has been drawn in which a similar state of circumstances existed is that of *Doe v. Lines* (1848) 11 Q. B. 402, 116 Eng. Reprint, 527, 17 L. J. Q. B. N. S. 108, 12 Jur. 80. There it was held that the tenancy from year to year commenced from the date of the expiration of the previous lease. By what I think is a somewhat inverse process of reasoning it is said that that case is an exception to the rule traceable to and to be accounted for by the fact that the sitting tenant was not the lessee who originally entered, but an assignee. But there is no trace as far as I can see in the arguments, or in the judgment, of anything which leads to the conclusion that the case was treated as exceptional on that ground, and the attitude which is taken on behalf of the appellant in dealing with that case presupposes the existence of the rule as stated in the textbooks which have been referred to. I do not propose to go through the cases or to restate the reasons fully and adequately stated by my Lords why we have come to the conclusion that no such rule exists. When once the existence of the rule is disproved the assertion that *Doe v. Lines* is an exception to that rule of course falls with it. I think this case comes within the principle of *Doe v. Lines*, and we are, as it

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seems to me, happily constrained to hold that the existence of the state of things which Mr. Chubb contends existed here resulted in a tenancy from year to year, following on the holding over by the respondent and commencing from the expiration of the tenancy agreement and not from the date of its commencement. I agree, therefore, in thinking that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *H. M. R. Potheary, for Drummonds, Croydon;*
E. S. Trehearne.

Note.—Date of commencement of tenancy arising out of a holding over.

Although the rule that where a tenant holds over after a lease for a year or years with the consent of his landlord express or implied, the law will imply an agreement on his part to hold for another year, is (except where affected by local statutes) generally recognized in the United States (see *Crommelin v. Thiess* (1858) 31 Ala. 412, 70 Am. Dec. 499; *Wolfe v. Wolff* (1881) 69 Ala. 549, 44 Am. Rep. 526; *Robinson v. Holt* (1890) 90 Ala. 115, 7 So. 441; *A. G. Rhodes Furniture Co. v. Weeden* (1895) 108 Ala. 252, 19 So. 318; *Zippar v. Reppy* (1890) 15 Colo. 260, 25 Pac. 164; *Bacon v. Brown* (1832) 9 Conn. 334; *Prickett v. Ritter* (1854) 16 Ill. 96; *McKinney v. Peck* (1862) 28 Ill. 174; *Clinton Wire Cloth Co. v. Gardner* (1881) 99 Ill. 151; *Wolz v. Sanford* (1882) 10 Ill. App. 136; *Quinlan v. Bonte* (1887) 25 Ill. App. 240; *Bills v. Cooling* (1914) 187 Ill. App. 642; *Besley v. Ridgely* (1915) 195 Ill. App. 435; *Scott v. Beecher* (1892) 91 Mich. 590, 52 N. W. 20; *Mason v. Wierengo* (1897) 113 Mich. 151, 67 Am. St. Rep. 461, 71 N. W. 489; *Richardson v. Neblett* (1920) 122 Miss. 723, 10 A.L.R. 272, 84 So. 695; *Critchfield v. Remaley* (1887) 21 Neb. 178, 31 N. W. 687; *Schuyler v. Smith* (1873) 51 N. Y. 309, 10 Am. Rep. 609; *Davies v. New York* (1880) 83 N. Y. 207; *Park v. Castle* (1860) 19 How. Pr. 29; *Johnson v. Doll* (1885) 11 Misc. 345, 32 N. Y. Supp. 132; *Pierson v. Hughes* (1904) 87 N. Y. Supp. 223; *Flomerfelt v. Dillon* (1904) 88 N. Y. Supp. 132; *Phelan v. Kennedy* (1918) 103 Misc. 441, 171 N. Y. Supp. 410, affirmed on other grounds in (1919) 185 App. Div. 749, 173 N. Y. Supp. 687; *Baltimore & O. R. Co. v. West* (1897) 57 Ohio St. 161, 49 N. E. 344; *Strong v. Schmidt* (1897) 13 Ohio C. C. 302, 7 Ohio C. D. 233; *Rickard v. Utter* (1916) 25 Ohio C. C. N. S. 577; *Hemphill v. Flynn* (1895) 2 Pa. St. 144; *Harvey v. Gunzberg* (1892) 148 Pa. 294, 23 Atl. 1005; *Pettit v. Edwards* (1908) 18 Pa. Dist. R. 73; *Banbury v. Sherin* (1893) 10 B. R. C.

4 S. D. 88, 55 N. W. 723; *Shepherd v. Cummings* (1860) 1 Coldw. 354; *Bateman v. Maddox* (1894) 86 Tex. 546, 26 S. W. 51; *San Antonio v. French* (1891) 80 Tex. 575, 26 Am. St. Rep. 763, 16 S. W. 440; *Abeel v. McDonnell* (1905) 39 Tex. Civ. App. 453, 87 S. W. 1066; *Amsden v. Atwood* (1897) 69 Vt. 527, 38 Atl. 263; *Kugler v. United States* (1868) 4 Ct. Cl. 407), the question considered in the reported case (*CROFT v. WILLIAM F. BLAY, ante*, 981) whether the date of the expiration of the original lease, or the date of the commencement of the tenancy thereunder, is to be taken as the date of the commencement of the new tenancy, seems never to have been considered, although in two cases in which the question might have been raised (*Brackin v. Desverges* (1916) 18 Ga. App. 265, 84 S. E. 303, and *Baltimore & O. R. Co. v. West* (1897) 57 Ohio St. 161, 49 N. E. 344), the tenancy was regarded as beginning when the original lease expired.

It should be noted, however, that it has been held that where the original lease is void, the tenancy is from year to year from its beginning, with the possible right to terminate such tenancy without notice at the date fixed in the lease therefor. See *Berrey v. Lindley* (1841) 3 Mann. & G. 498, 133 Eng. Reprint, 1240, 4 Scott, N. R. 61, 11 L. J. C. P. N. S. 27, 5 Jur. 1061; *Doe ex dem. Robinson v. Dobell* (1841) 1 Q. B. 806, 113 Eng. Reprint, 1340, 10 L. J. Q. B. N. S. 242 (both of which are commented upon in *CROFT v. WILLIAM F. BLAY*); *Coudert v. Cohn* (1890) 118 N. Y. 309, 7 L.R.A. 69, 16 Am. St. Rep. 761, 23 N. E. 298. These decisions, however, would seem to be at variance with *Doe ex dem. Rigge v. Bell* (1793), 5 T. R. 471, 101 Eng. Reprint, 265, 2 Revised Rep. 642, 15 Eng. Rul. Cas. 596, in which land having been leased for a term of years by parol, it being agreed that the tenant should enter at Lady Day and quit at Candlemas, it was held that though the agreement was void by the Statute of Frauds as to the number of years for which the tenant was to hold, yet if the lessor chose to determine the tenancy before the expiration of the seven years, he could only put an end to it at Candlemas.

Where a tenant for life makes a lease for years to commence on a certain day, and dies before the expiration of the lease, and the remainderman receives rent from the lessee (who continues in possession) for two years together on the day of payment mentioned in the lease, the court will presume an agreement between the remainderman and the lessee that the lessee should continue to hold from the day of the commencement of the tenancy, so that notice to quit ending on that day is proper. *Roe ex dem. Jordan v. Ward* (1789) 1 H. Bl. 97, 126 Eng. Reprint, 58, 2 Revised Rep. 728, 15 Eng. Rul. Cas. 590.

And in the case of *Doe ex dem. Collins v. Weller* (1798) 7 T. R. 478, 101 Eng. Reprint, 1086, 4 Revised Rep. 496, it is held that 10 B. R. C.

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So where after the death of a tenant from year to year, his widow, by agreement with the landlord, continues to occupy the premises at the same rent, nothing being said about the commencement of her tenancy, there is evidence to warrant a finding that such tenancy is a mere continuation of the original tenancy, and therefore properly determined by a notice to expire at an anniversary of the date of the commencement of such tenancy. *Humphreys v. Franks* (1856) 18 C. B. 323, 139 Eng. Reprint, 1394.

But where an undertenant is allowed by the superior landlord to hold over, he holds according to the year of the undertenancy, and not from the date of expiration of the original lease. *Kelly v. Patterson* (1874) L. R. 9 C. P. 681, 43 L. J. C. P. N. S. 320, 30 L. T. N. S. 842.

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E. S. O.

10 B. R. C.

BRITISH RULING CASES

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The classification of the matter in this Index is identical with that of the Complete L.R.A. Digest, except that subdivisions and section lines for which this Index contains no material are omitted.

The purpose of such arrangement is to enable the user to extend his search from this Index into that Digest, or vice versa, simply by looking under the corresponding division or section number.

Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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- c. Dangerous premises and attractions, §§ 62, 63, 67, 87.
- d. On waters, § 115.

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- a. In general, §§ 117, 120, 123.
- b. Of persons under disability, § 136.
- c. Other cases, § 144.
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- e. Injury avoidable notwithstanding contributory negligence; last clear chance, § 167.

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§ 27. Liability for escape of.

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— consistency with Roman Law. 2:114.

— applicability where resulting injury is to use of property for other than an ordinary purpose. 2:114.

Italic type indicates points with annotation.

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§ 30. Generally.

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Duty of seller of tin of chlorinated lime to warn purchaser of danger to person carelessly opening it. 3:435.

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§ 67. Liability to invitees generally.

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Italic type indicates points with annotation.

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a. By knowledge of agent or representative, §§ 20, 21.

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In railway car cautioning passengers not to put heads or arms out of window as condition of contract of conveyance, see **CARRIERS**, § 67.

Sufficiency of, to entitle mortgagee of personalty to exercise power of sale, see **CHATTEL MORTGAGE**, § 68.

Sufficiency of evidence to establish, see **EVIDENCE**, § 1509.

Required by provisions of indemnity insurance policy, see **INSURANCE**, § 844.

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I. IN GENERAL.

§ 4. **Facts putting on inquiry.**

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- I. What are, §§ 7, 14, 41, 57.**
III. Remedies:
 b. Action for damages, §§ 99, 104.
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Italic type indicates points with annotation.

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Liability of officers having charge of public charitable institution for negligence toward inmate. 6:555 (case p. 536).

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a. Persons who may or must sue, §§ 1, 10, 54.

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a. Proper and necessary parties, § 93.

b. Joinder, § 130.

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Italic type indicates points with annotation.

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§ 93. Representative defendants.

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§ 46. Private transactions.

Liability of partner for goods purchased by copartner with view to separate venture, where goods are subsequently taken into stock and disposed of for benefit of firm. 2:254.

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§ 94. Rights and liabilities of retiring partner.

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Applicability, where partnership is dissolved by war, of statute declaring outgoing partner entitled to share of profits, or interest, where business is continued without any settlement of accounts. 7:600.

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Italic type indicates points with annotation.

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§ 11. Trust estates.

Bequest in trust to maintain residence as violating rule against perpetuities. 7:441 (case p. 435).

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§ 13. Options.

Right to damages for breach of option contract which is not specifically enforceable because it contravenes the rule against perpetuities. 4:292 (case p. 280).

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§ 18. Effect upon gift over of invalidity of prior gift.

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Italic type indicates points with annotation.

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Validity of testamentary provision for erection of monument or for the care and maintenance of tombs, burial grounds, etc. 1:931 (case p. 923).

Validity of bequest in trust for care of testator's grave. 10:559.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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- c. Necessity of recording; effect of failure.

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Italic type indicates points with annotation.

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- II. Legislation against, § 11.
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- § 7. Enforceability of contracts in restraint of trade.

Refusal of court to enforce contract where fact comes to light during trial which shows it to be in unreasonable restraint of trade. 7:530 (opinion of Lord Moulton).

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Italic type indicates points with annotation.

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b. **Passing of title, §§ 25, 42, 44, 46.**

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Validity of contract between persons in England, prior to war between England and Germany, for sale of goods to be delivered either on board vessel or at selected warehouse in a German port, and which provides that in event of war the contract is to be deemed closed at price prevailing on certain date and the matter adjusted by payment of difference between such price and contract price. 8:432.

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§ 6. Mutuality; definiteness; offers.

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§ 42. Effect of mistake as to identity of purchaser.

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Semble, that provision for suspension of contract of sale in event of war, does not apply to case of war between countries of contracting parties. 8:734.

Right of buyer, under agreement made upon settlement of suit instituted after partial performance of contract of sale, by which he was to pay for goods received and to have option of taking balance, to exercise option while refusing to make payment unless balance of goods should be delivered. 9:399.

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§ 102. Place of delivery.

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Italic type indicates points with annotation.

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Sale of goods for export as made upon implied condition that it shall be possible to export them. 8:432.

Provision in c. i. f. contract that in event of war seller may effect insurance against war risks for account and risk of buyer, as throwing risk of all consequences of war upon buyer. 7:934.

Effect of war between countries of contracting parties to dissolve contract for sale and delivery of quantity of ore to be shipped from a neutral country in instalments during a period of years. 8:734.

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§ 126. Payment in instalments.

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§ 136. Lien.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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Italic type indicates points with annotation.

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- d. Description of beneficiaries; class gifts, §§ 200, 202, 203, 208, 212, 217-219.
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Italic type indicates points with annotation.

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IX. EXECUTION; ATTESTATION.**§ 60. Generally.**

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X. REVOCATION; REVIVAL.**§ 84. Generally.**

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Subsequent ratification of unauthorized destruction as revocation of will. 2:550 (case p. 544).

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§ 181. Gift in one alternative as implying gift in another.

Gift over by implication where property is given over at death and first taker marries, or vice versa. 4:206.

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§ 197. Residuary clause.

Bequest of "the rest of my money" as comprehending entire residuary estate. 4:548 (case p. 546).

When will the appointment of a "residuary legatee" amount to a gift of undisposed-of realty. 5:141 (case p. 136).

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Italic type indicates points with annotation.

d. Description of beneficiaries; class gifts.**§ 200. Mode of designation.**

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Accurate use of name as precluding further inquiry into identity of person intended. 8:839 (opinion of Earl Loreburn).

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§ 202. — misnomer, or error in description.

Effect of description of a legatee as sustaining a relationship to the testator which he does not in fact bear to entitle him to share in a gift to relatives of that degree. 8:131.

Characterization of persons appointed executors as "my nephews," when one of them was a nephew of the testatrix and two nephews of her husband, as entitling nephews and nieces of husband generally, or nephews named as executors, to participate in gift to "my nephews and nieces." 8:125.

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§ 203. Heirs.

Meaning of devise to "nearest male heirs." 7:982 (case p. 957).

§ 208. Next of kin.

Law governing construction of testamentary gift to next of kin of person domiciled in another jurisdiction, see CONFLICT OF LAWS, § 142.

§ 212. Children.

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Capacity of child en ventre sa mere to take under devise or bequest to "children," etc. 1:582.

Gift to children "living" or "born" at a certain period as including child in ventre sa mere. 1:568; 1:587.

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§ 217. Class gifts.

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§ 218. Bequest as one to class or individuals.

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Bequest to A and the child or children of B, where persons described are in fact all testator's nephews and nieces. 7:775.

§ 219. Time of ascertainment of class.

Time for ascertaining remainderman under gift of remainder, after life estate, to testator's "nearest male heir." 7:957.

f. Gifts over upon a contingency.**§ 228. Dying without issue — gifts to which contingency applies.**

Applicability of provision that in case of death without issue the share of the beneficiary shall fall into residue, to accrued as well as original shares. 3:145.

- g. Nature of estate or interest created.**
- 1. In general.**
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- Provision that devisee may sell only to one of his brothers, and for a price to be determined, in event of disagreement, by arbitration, as repugnant to estate devised. 1:813.
- 2. Estates or gifts upon condition.**
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- § 266. Conditions and limitations distinguished.
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Italic type indicates points with annotation.

XIV. OPERATION AND EFFECT.**§ 306. Exclusion from participation in estate.**

Effect of declaration of will cutting off heir or next of kin or restricting him to provision made, to exclude him from participation in testator's property. 10:566 (case p. 559).

Effect of declaration in will that certain person is "not to have a penny," to exclude him from participation as one of next of kin, in property not effectually disposed of. 10:559.

XV. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.**a. In general.****§ 309. Generally.**

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Applicability of presumption that testator does not intend life tenant to consume principal, to case of hazardous securities. 6:199.

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§ 318. Rights of executory devisees.
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§ 319. Bequests to creditors.

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§ 320. Deduction of debts due estate.

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c. Abatement.**§ 327. Generally.**

Legacy given in satisfaction of ascertained debt as subject to abatement. 2:502.

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Effect of death during testator's lifetime, of member of class to which bequest is made. 7:775.

§ 341. Operation of statute to prevent.

Effect of statutes designed to prevent lapsing of testamentary provisions upon death of beneficiary in testator's lifetime, to render property bequeathed twice liable to estate duty, see TAXES, § 269.

Right of trustee in bankruptcy of legatee dying before testator to claim legacy under statute preventing lapse. 10:558 (case p. 554).

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§ 342. Generally.

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Effect of election in one jurisdiction upon right to elect as to property situated in another jurisdiction. 3:519 (case p. 509).

§ 353. Effect of election against will.
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Effect of election in one jurisdiction upon right to elect as to property situated in another jurisdiction. 3:519 (case p. 509).

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1. Effect of failure, lapse, or renunciation on other provisions; devolution on failure of gift.

§ 372. Devolution of lapsed or void devises or legacies — on failure of residuary gift.

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Italic type indicates points with annotation.

III. EXAMINATION.**b. Cross-examination.****§ 67. To discredit witness.**

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- 65. "Share of the net profits." 8:599.
- 66. "Special adaptability." 8:1; 8:23; 8:35.
- 67. "Storing or keeping." 3:1.
- 68. Taxation. 8:171.
- 69. "The rest of my money." 4:546.
- 70. "Trade dispute." 1:197.
- 71. "Trading or dealing." 7:284.
- 71½. "Transit between any houses or places." 10:895.
- 72. "Unlawful means." 9:982.
- 73. "Unusual danger." 8:972; 9:52.
- 74. "Voluntary exposure to unnecessary danger." 5:870.
- 75. Wasting securities. 6:199.
- 76. "While." 9:336 (opinion of Anglin, J.).
- 77. "While occupied as a dwelling." 9:336.
- 78. Widow. 4:50.
- 79. "With interest at 6 per cent per annum." 9:460.
- 80. "Wrongful dismissal." 9:567.

WORKING PEOPLE.

Validity of trust to provide holidays for working people, see CHARITIES, § 19½.

WORKMEN'S COMPENSATION.

I. In general; nature and grounds of master's liability:

- d. What injuries or diseases are within provisions of act, §§ 25, 34, 34½, 39½, 41, 42½, 46½, 51, 51½.

II. Compensation:

- b. Amount and computation of award, § 70.

- c. Who entitled to compensation; dependents, §§ 80, 84, 85.

III. Practice; proceedings, §§ 88, 92.

Breaking down of pump as proximate cause of injury to workman in bailing out mine pit, see PROXIMATE CAUSE, § 86.

I. IN GENERAL; NATURE AND GROUNDS OF MASTER'S LIABILITY.

- d. What injuries or diseases are within provisions of act.

1. In general.

§ 25. Injury as proximate cause. Of death under anesthetic. 3:62.

2. What injuries are accidental or personal.

§ 34. Disease as accidental or personal injury.

Disease as "accident" within Workmen's Compensation Act. 9:478 (opinion of Lord Birkenhead).

§ 34½ [New]. Infection; blood poisoning.

Infection as "accident" within Workmen's Compensation Act. 9:513 (case p. 478).

§ 39½ [New]. Rheumatism; sciatica.

Rheumatism or sciatica contracted by workman as an "accident," or "personal injury." 10:322 (case p. 308).

3. Injuries arising out of or in course of employment.

§ 41. Generally.

Workmen's compensation: accident to employee while using means of access not authorized by his employer as one arising out of and in the course of his employment. 10:331 (case p. 325).

Accident occasioned by adoption of dangerous method of doing work as one arising out of employment within meaning of Workmen's Compensation Act. 7:137.

Tests applicable in determining whether injury arose out of employment. 7:128.

Test of whether injury arises in course of employment. 10:806 (opinion of Lord Dunedin).

§ 42½ [New]. Injuries received in doing prohibited act.

Right to compensation where injury results from doing prohibited act. 7:159.

Italic type indicates points with annotation.

Injury to switchman riding on bumper of car, contrary to employer's rule. 7:142.

Effect of transgressions of prohibitions limiting sphere of employment, and of those dealing with conduct within sphere of employment. 7:128 (opinion of Lord Dunedin).

§ 46½ [New]. Injuries while seeking or taking refreshment.

Accident to one while seeking or taking refreshment as one arising out of and in the course of his employment. 6:471; 10:829.

Accident to brewer's drayman struck by automobile while returning to dray from public house where he had stopped for a glass of beer, as one arising out of and in course of employment. 6:466.

Injury to employee returning to work after dinner at canteen maintained by employer. 10:806.

§ 51. Various particular injuries.

Sufficiency of proof that infection causing blood poisoning arose out of and in course of employment, see EVIDENCE, § 1612½.

Injury to workman employed in stacking bundles, through use, for purpose of raising bundles to top of stack, of rope thrown over revolving shaft. 7:128.

§ 51½ [New]. Chill

Chill as an accident within Workmen's Compensation Act. 10:189 (case p. 161).

II. COMPENSATION.

b. Amount and computation of award.

1. Disability benefits.

§ 70. Basis for computing generally.

Right to take tips into consideration. 9:219.

Inclusion of gratuities received from passengers by railway porter in determining earnings for purpose of assessing compensation. 9:213.

Effect of interruption of employment by strike on measure of compensation. 9:334 (case p. 317).

c. Who entitled to compensation; dependents.

§ 80. Generally.

Legal duty to support wife or child as evidence of dependency. 6:827.

§ 84. Children.

Posthumous child. 6:827.

Semble, that fact of dependency of child does not necessarily rest upon any promise of support by father. 6:827 (opinion of Lord Shaw of Dunfermline).

§ 85. — illegitimate.

Admissibility of evidence of statements made by deceased putative father acknowledging paternity of child, and that he intended to marry the mother before the child should be born, as bearing on issues of paternity and dependency, see EVIDENCE, § 1393.

III. PRACTICE; PROCEEDINGS.

§ 86. Generally.

What constitutes reasonable cause for not making claim for compensation within time limited by Workmen's Compensation Act. 8:942.

Continuation by employer of full wages during time while workman was suffering from effects of injury, and until his discharge, as excuse for failure to make claim for compensation within time fixed by statute. 8:928.

Compliance with provisions as to fixing date of accident. 9:478.

Reduction of award as for total dependency where claim was for dependency in part. 6:827 (opinion of Lords Loreburn and Atkinson).

§ 92. Review and conclusiveness of decisions of commission.

Extent to which award is open to review, see APPEAL AND ERROR, § 660.

WRECK.

Liability of vessel causing collision for expense of removal of, from harbor, see COLLISION, § 1.

Liability of insurer against sea perils for loss of neutral vessel by wreck, after her seizure by a belligerent, see INSURANCE, § 821.

WRIT AND PROCESS.

Foreign corporations having agent to solicit business and receive and transmit orders, as doing business within jurisdiction so as to be subject to service of process therein, see CORPORATIONS, § 390.

II. SERVICE AND EXECUTION.**a. In general.**

§ 23½ [New]. On alien enemy.

Sufficiency of constructive service on alien enemy. 5:594.

Service of process in action against alien enemy resident in enemy's country. 5:548.

WRONGFUL DISCHARGE.

Of employee, see MASTER AND SERVANT, I. g.

WRONGFUL DISMISSAL.

See WORDS AND PHRASES, 80.

Italic type indicates points with annotation.

LRA
1/18/23



